116-548

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1250.

GEORGE K. OTIS, PLAINTIFF IN ERROR,

vs.

THE OREGON STEAMSHIP COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED JANUARY 18, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1250.

GEORGE K. OTIS, PLAINTIFF IN ERROR,

vs.

THE OREGON STEAMSHIP COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Return to writ of error	1	1
Petition for writ of error	2	1
Writ of error	5	2
Assignment of errors	7	3
Citation	10	3
Acknowledgment of service of citation	11	4
Opinion of court of appeals	12	4
Bond	24	8
Remittitur to superior court of New York	28	9
Transcript from superior court of New York	32	10
Statement	32	10
Summons	32	11
Complaint	33	11
Answer	36	13
Order of reference	38	14
Report of referee	39	14
Plaintiff's request to referee	42	16
Judgment	42	16
Notice of appeal	43	16
Evidence before referee	44	17

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Testimony of Wm. Arnoux	44	17
Exhibit 2—Subpœna	45	17
Testimony of David P. Thompson	46	18
Exhibit 3—Proposal	48	19
4—Contract	51	21
32—Account	58	25
Testimony of Wm. Norris	59	27
Exhibit 3—Telegram of Otis to Norris, Aug. 11, 1874	68	32
4 " " " Oct. 10, 1874	69	32
5 " " " Nov. 18, 1874	69	33
6 " " " Feb. 3, 1875	69	33
7 " " " Feb. 12, 1875	70	33
8 " of Norris to Otis, February 13, 1875	70	33
9 " " " Holladay, Feb. 13, 1875	70	34
10 " of Holladay to Norris, Feb. 13, 1875	71	34
11 " of Otis to Norris, Feb. 15, 1875	71	34
12 " of Norris to Otis, Feb. 15, 1875	71	24
13 " " " Feb. 15, 1875	71	34
14—Letter " " Feb. 15, 1875	72	35
15—Telegram " " Holladay, Feb. 15, 1875	72	35
16—Letter " " Otis, Feb. 15, 1875	73	35
17—Telegram of Otis to Norris, Feb. 16, 1875	74	36
18 " " " Feb. 29, 1875	74	36
19 " of Norris to Otis, Feb. 23, 1875	74	36
20—Letter " " Feb. 25, 1885	75	36
21—Telegram of Otis to Norris, May 5, 1875	75	37
22—Letter " " May 24, 1875	76	37
23—Telegram " " July 26, 1875	77	38
24 " of Holladay to Norris, July 28, 1875	77	38
25 " of Norris to Otis, July 30, 1875	78	38
26 " of Otis to Norris, July 31, 1875	78	38
27 " of Norris to Otis, Aug. 3, 1875	78	39
28 " of Otis to Norris, Oct. 29, 1875	79	39
29 " " " Nov. 16, 1875	79	39
30 " " " Aug. 4, 1874	79	79
31 " " " Oct. 29, 1874	79	40
Testimony of Samuel Osgood Putnam	80	40
Henry Villard	84	42
George K. Otis	86	44
Exhibit 32—Letter of Norris to Holladay, Feb. 25, 1875	89	46
33—Telegram of Norris to Holladay, July 27, 1875	90	46
34 " " " July 27, 1875	90	46
35 " " " July 27, 1875	90	47
36 " " " July 27, 1875	91	47
37 " " " Oct. 14, 1875	91	47
38*a* " " " July 28, 1875	91	47
39—Letter " " Feb. 13, 1875	92	47
40—Telegram of Holladay to Norris, March 20, 1876	92	48
Requests of defendants	93	48
Opinion of referee	94	49
Exceptions to report of referee	107	56
Order of general term modifying decree	108	57

	Original.	Print.
Judgment of general term	109	57
Notice of appeal	111	58
Clerk's certificate	112	59
Order for stay	113	59
Affidavit of Jno. R. Abney	114	59
Proof of service of notice of motion	117	60
Notice of motion to vacate stay	118	61
Order to show cause	119	61
Affidavit of Jno. R. Abney	121	61
Geo. H. Adams	123	62
Order to return remittitur and record	126	63

1 STATE OF NEW YORK:

Court of Appeals.

THE OREGON STEAMSHIP COMPANY *v.* GEORGE K. OTIS.

CLERK'S OFFICE, ALBANY, *Dec'r* 31, 1885.

The answer of the judges of the court of appeals of the State of New York, the record and proceedings of the court, with all things concerning the same, we certify under the seal of our said court to the justices of the Supreme Court of the United States.

[Seal Court of Appeals, State of New York.]

E. O. PERRIN, *Clerk.*

2 To the Honorable Samuel Blatchford, justice of the Supreme Court of the United States:

And now comes George K. Otis, of the city of Brooklyn, in the State of New York, by John Sessions, his attorney, and complains that in the record and proceedings, and also in the rendition of a judgment, in a suit between Oregon Steamship Company, plaintiff, and George K. Otis, defendant, in the court of appeals of the State of New York, being the highest court of law or equity of the said State in which a decision could be had in said suit, and in which a final judgment was rendered against him on the twenty-fourth day of November, 1885, in said suit, (1) wherein a title was claimed under a statute of the United States and the decision is against the title specifically set up and claimed by the said George K. Otis under such statute, (2) wherein a title was claimed under a commission held under the United States and the decision is against the title specifically set up and claimed by the said George K. Otis under such commission, (3) wherein a title was claimed under an authority exercised under the United States and the decision is against the title specifically set up and claimed by the said George K. Otis under such authority, (4) wherein a right was claimed under a statute of the United States and the decision is against the right specifically set up and claimed by the said George K. Otis under such

3 statute, (5) wherein a right was claimed under a commission held under the United States and the decision is against the right set up and claimed by the said George K. Otis under such commission, and (6) wherein a right was claimed under an authority exercised under the United States and the decision is against the right specifically set up and claimed by the said George K. Otis under such authority, all which appears in the record and proceedings in said suit, manifest error hath happened to the great damage of the said George K. Otis.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

Dec. 3, 1885.

JOHN SESSIONS,
Attorney for Plaintiff in Error.

Allowed Dec. 4th, 1885.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

4 [Endorsed:] Supreme Court of the United States. George K. Otis, plaintiff in error, *vs.* Oregon Steamship Company, defendant in error. Petition for writ of error. John Sessions, att'y for plaintiff in error, 32 Pine St., New York.

5 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the court of appeals of the State of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Oregon Steamship Company, plaintiff, and George K. Otis, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution,

6 or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said George K. Otis, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fourth day of December, in the year of our Lord one thousand eight hundred and eighty-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

Dec. 4th, 1885.

[Endorsed:] Original writ of error.

7 U. S. Supreme Court. Of October Term, in the year of our Lord one thousand eight hundred and eighty-six.

GEORGE K. OTIS, Plaintiff in Error,
against
THE OREGON STEAMSHIP COMPANY, Defendant in Error.

Afterwards, to wit, on the first Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said George K. Otis, by John Sessions, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the judgment of the court of appeals of the State of New York aforesaid was against the title specially set up and claimed by the plaintiff in error under a statute of the United States.

Second. That the said judgment was against a right specially set up and claimed by the plaintiff in error under a statute of the United States.

Third. That the said judgment was against a privilege specially set up and claimed by the plaintiff in error under a statute of
8 the United States.

Fourth. That the said judgment was against an exemption specially set up and claimed by the plaintiff in error under a statute of the United States.

And the said George K. Otis prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment.

JOHN SESSIONS,
Attorney for Plaintiff in Error.

9 [Endorsed:] Supreme Court of the United States. George K. Otis, pl'ff in error, ag'st Oregon Steamship Company, def't in error. Assignment of errors. John Sessions, attorney for pl'ff in error.

10 *Citation to Supreme Court.*

UNITED STATES OF AMERICA, *ss:*

To the Oregon Steamship Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein George K. Otis is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Blatchford, associate justice of the

Supreme Court of the United States, this 4th day of December, in the year of our Lord one thousand eight hundred and eighty-five.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

11 [Endorsed:] Due service of a copy of within citation is hereby admitted. N. Y., Dec. 7th, 1885. Holmes & Adams, att'ys for Oregon Steamship Company, def't in error. Supreme Court of the United States. George K. Otis, plaintiff in error, *vs.* Oregon Steamship Company, defendant in error. Citation to Supreme Court. John Sessions, att'y for plaintiff in error, 32 Nassau St., New York.

12 Court of Appeals.

THE OREGON STEAMSHIP CO., Resp't,
v.
GEORGE K. OTIS, App'l't.

John R. Abney, for app'l't; Geo. H. Adams, for resp't.

FINCH, *J.:*

The referee has found that the defendant's contract with the Goverment to transport the mails between San Francisco & Portland, Oregon, though made in his own name as contractor, was in reality made by him as agent for & in behalf of the plaintiff company which actually performed the service; that the compensation paid him as between himself & the plaintiff belonged to the latter, except that out of it Otis was entitled to retain a commission for his agency; that he, in fact, retained & refused to pay over a much larger sum, for the conversion of which he was sued with the result of a recovery against him. The evidence was sufficient to warrant the con-
13 clusion of the referee upon the facts; but, assuming them as they have been found, the appellant seeks to defend upon the contention that his agreement of agency was void, because in contravention of the Federal law, which makes it legally impossible for a contractor to sell or transfer or assign his contract for the transportation of the mails. We do not think that fact could operate to annul the agency or vitiate the liability to the plaintiff, so far as the money actually received was concerned. By § 3954 of the U. S. Revised Statutes it is made a misdemeanor for the bidder to refuse to enter into the contract & perform the contracted service. Otis did enter into the contract &, as between him & the Government, did perform the service & receive the stipulated pay. By § 3963 it is provided that the contractor shall not assign or transfer his contract, & such assignment or transfer shall be void. Otis made no assignment or transfer. As between him & the Government he remained contractor & gave to nobody any right through or under him against the employer. That did not prevent him from holding the contract for the benefit of the company which performed the service
14 & agreeing to collect & hold the pay for them & as their property when received. That was the agreement which the

referee found was made, & it violated neither the letter nor spirit of the law. The obvious aim of the enactment was to prevent a liability of the Government upon the contract to any person but the accepted bidder. That object was accomplished. What became of the money when earned & paid was immaterial to the employer, & Otis might, as he did, put himself in the attitude of an agent for the defendant company as between them. This question does not appear by the record to have been specifically raised, & it is quite probable that the exceptions were too general & ambiguous to present it for review. But it seems to have been considered & discussed in the courts below, & so we have thought it best to dispose of it here.

But other & very serious questions were raised by objections taken to the admission in evidence of a large number of letters & telegrams. Many of these documents were important in their bearing upon the facts, & must have largely contributed to the ultimate result. They consisted of three letters from Norris to Otis & one from Otis to Norris, & then of a large number of telegrams, & the
15 objections were that as to those purporting to be addressed to the defendant there was no competent evidence that he ever received the originals, & as to those purporting to have been signed by him that there was no competent evidence that he ever wrote or sent them. Our consideration must be limited to these precise objections & to the question as between sender & receiver.

Norris swears that he sent the three letters written by him to Otis. In the absence of any proof to the contrary, or any inquiry as to the mode, we must understand this to mean that they were mailed in the usual manner. If there was doubt about that the attention of Norris should have been drawn to it & the manner of transmission challenged. It would be extremely critical to deny to the form of expression used by the witness its ordinary & usual interpretation, because it might have been more precise & explicit in a case where the party addressed is examined as a witness & does not deny the receipt of the letters, although material to the issue. On such a state of facts the jury were authorized to believe that the three letters sent to Otis were received by him. The one letter sent by Otis to Norris was identified by the latter, who knew his correspondent's handwriting, as appears by the deposition. Notice to produce the
16 letters of Norris was given, & not being produced copies of them were read in evidence.

But there is more difficulty about the telegrams. The originals were shown to have been destroyed by the telegraph company, so that a resort to secondary evidence became necessary. We shall first consider the proof as to those sent by Norris. It consisted merely of his statement that he sent the messages by telegraph to Otis, who resided in New York, directed to him at that city. Such direction appears upon the copies produced. And the first question is whether a similar presumption of fact follows the delivery of a message, properly addressed, to the telegraph company for transmission to that which follows the delivery of a letter to the post office. The drift of authority gives an affirmative answer. (Grayon Telegrams,

§ 136; Commonwealth *v.* Jeffries, 7 Allen, 548; Wharton on Ev., § 76; State *v.* Hopkins, 50 Verm., 316; Scott & Jarnagin on Tel., § 345.) The presumption indulged is one of fact, & so open to rebuttal & contradiction, & consists merely in the natural inference which may be drawn from the experienced certainty of transmission. The great bulk of letters sent by mail reach their destination, & equally so the great bulk of telegrams. A failure in either case is an exception; possible, but rare. The letters are transported by Government officials acting under oath & upon a system framed to
17 secure regularity & precision. The telegrams by private corporations, whose success & prosperity depend largely upon the promptness & accuracy of the work, & are faithful under the incentive of interest—these companies perform a public service, & are regulated to some extent by the public law. They are authorized to cross with their wires any waters within the limits of the State (L. 1845, ch. 243); to construct their lines along & upon the public roads & highways (L. 1848, ch. 265), & upon & over the lands of individuals, paying the agreed & appraised compensation therefor (L. 1853, ch. 471); injury to their lines is made a misdemeanor (L. 1870, ch. 491); the companies are required to transmit all dispatches in the order of their receipt—to accept & forward them from connecting lines; the operators are exempt from military service & jury duty (L. 1861, ch. 215); & it is made a misdemeanor for any employee to divulge the nature or contents of a private telegram, or wilfully refuse or neglect to transmit or deliver the same. (L. 1867, ch. 871.) There is thus impressed upon the telegraph service something of a public character, & thrown around it the guard & the obligations of the public law, & it seems to us reasonable to assimilate the rules of evidence founded upon transmission by mail to that of transmission by telegraph. It may be that the presumption of correct delivery, agreeing in kind
18 with that raised upon delivery to the post office, should be deemed weaker in degree, but, in view of the wide extension of telegraph facilities, & of their increasing use in business correspondence, & the difficulty of tracing a dispatch to its destination, we think it should be held that upon proof of the delivery of the message for the purpose of transmission, properly addressed, to the correspondent at his place of residence, or where he is shown to be, a presumption of fact arises that the telegram reached its destination, sufficient at least to put the other party to his denial & raise an issue to be determined. Here there was no denial; & the presumption, however weak at the outset, became strong & convincing. There is greater safety in conceding the existence of such a presumption of fact under a system like ours, in which the party addressed is always at liberty to testify, & if dead his representatives are protected against the evidence of his adversary as to personal transactions & communications.

We turn now to the telegrams alleged to have been sent by Otis. While the transcript delivered to the person addressed is, for some purposes, as between him & the sender, deemed the original, it never can be without competent proof that the alleged sender did

actually send or authorize to be sent the dispatches in ques-
19 tion. The primary & original evidence of that fact would be the telegram itself in the handwriting of the sender or of an agent shown to have been duly authorized. But when it appears that the telegram has been destroyed by the company secondary evidence of the essential fact may be given. The general term have put great stress upon the circumstances that when on the witness stand the defendant did not dispute the authenticity of the telegrams, & thence reasoned that, if improperly admitted at first, they became competent afterwards. There is much of force in the argument; but we think there was some some evidence of genuineness of a different character. Exhibit 4 is in an agreed cipher, which identifies it with a certainty at least equal to that of a proved handwriting. Exhibits 8, 9, & 10 were not objected to. They refer to No. 7, asserting that it was received from Otis, & reciting its substantial contents. They are followed by No. 11. These two, 7 & 11, purport to have come from Otis, & their material point is a claim by him for salary, in addition to commissions. Now, No. 14 & No. 20 are letters from Norris to Otis, which he presumably received, & never disputed, either by an answer or on the witness stand. Those letters recite the receipt of Otis' previous telegrams claiming a salary in addition to commissions, & paying that claim under protest by draft enclosed. If he had not sent these dispatches the letters re-
20 quired of him a denial, or at least an explanation of his silence when called on as a witness. He did neither, & hence the receipt of the letters & the omission to challenge their recitals amount to an admission that he did send Exhibits 7 & 11. No. 21 is verified by the letter of Otis, No. 22. Exhibits 5, 6, 29, 30, & 31 purport to be directions from Otis to Norris to draw for specific sums of the mail pay. Their importance lies in their amounts as excluding a deduction for salary, or making that deduction. Putnam, who was cashier & book-keeper, testifies that defendant resided in New York city; would telegraph to Norris to draw for specific sums; that such drafts were drawn & paid & the amounts entered to Otis' credit on the books. In each case the payment of the draft would verify to Putnam the genuineness of Otis' telegram to draw, & these telegrams Putnam delivered to Norris, who produced them. The credits on the books corresponding with the telegram amounts *exact* with the account, the correctness of which Otis does not dispute, but only denies that he is liable at all. These facts furnish some evidence that Otis did send the telegrams in question. Exhibit 26 is a refusal to pay a specific draft, & is made immaterial by what follows. No. 27 was from Norris & verifies No. 23 as sent by Otis. There remain Exhibits 3, 15, 17, 18, & 28 covered by the objection, & these seem
21 to us entirely immaterial & bearing in no degree upon the questions litigated beyond what is sufficiently established by other competent proof. There was thus some evidence presented to the court, without objection to its character when given, tending to prove that Otis did send the telegrams purporting to be signed by him. It was claimed afterward not to be competent, but, so far as the case shows, it was the best evidence attainable, & no specific objection

was made that there was better evidence & no facts proved indicating it. The court held that a *prima facie* case was made of the genuineness of the dispatches as having emanated from Otis, & that being so the transcript delivered to Norris became admissible, in the absence of any objection to their accuracy as copies or to the correctness of their transmission. So far, then, as the telegrams were material, we think there was no error in their admission; that they were in truth authorized & genuine because in the end most thoroughly established by Otis' omission to dispute them as a witness.

Some other questions of evidence were raised which we have examined, but deem it unnecessary to discuss.

22 The judgment should be affirmed, with costs.

"All concur."

A copy.

H. E. SICKELS,
Reporter.

P'r C.

23 [Endorsed:] Court of appeals. The Oregon Steamship Co. *v.* Otis. Finch, J.

24 Supreme Court of the United States:

Know all men by these presents that we, George K. Otis, of New York; Edward A. Abbott, of Massachusetts, and Ellen E. Otis, of New York, are held and firmly bound unto Oregon Steamship Company, of Oregon, in the sum of forty thousand dollars, to be paid to the said Oregon Steamship Company or its assignee or assignees; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 3rd day of December, 1885.

Whereas the above-named Georege K. Otis hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the court of appeals of the State of New York:

Now, therefore, the condition of this obligation is such that if the above-named George K. Otis shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this oblgation shall be void; otherwise, to remain in full force and virtue.

GEORGE K. OTIS. [L. S.]
EDWARD A. ABBOT. [L. S.]
ELLEN E. OTIS. [L. S.]

Sealed and delivered in presence of—
JOHN A. OSBORN.

25 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Edward A. Abbott, being duly sworn, deposes and says: That he

is worth the sum of forty thousand dollars over and above all his just debts and liabilities.

EDWARD A. ABBOT.

Sworn to before me this the 3d day of December, 1885.
[L. S.] JOHN A. OSBORN,
U. S. Commissioner.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Ellen E. Otis, being duly sworn, deposes and says: That she is worth the sum of twenty thousand dollars over and above all her just debts and liabilities.

ELLEN E. OTIS.

Sworn to before me this the 3d day of December, 1885.
[L. S.] JOHN A. OSBORN,
U. S. Commissioner.

I approve the above bond and the sufficiency of the sureties thereto, December 4th, 1885.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

26 [Endorsed:] Supreme Court of the United States. George K. Otis, plaintiff in error, *vs.* Oregon Steamship Company, defendant in error. Security. John Sessions, att'y for plaintiff in error, 32 Pine St., New York.

27 New York Court of Appeals.

THE OREGON STEAMSHIP COMPANY, Plaintiff and Respondent,
against
GEORGE K. OTIS, Defendant and Appellant.

Return on Appeal. Filed Oct. 20, 1883.

John Sessions, attorney for defendant and appellant.
Holmes & Adams, attorneys for plaintiff and respondent.

28 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 24th day of November, in the year of our Lord one thousand eight hundred and eighty-five, before the judges of said court.

Witness the Hon. William C. Ruger, chief judge, presiding.
E. O. PERRIN, *Clerk.*

Remittitur November 25, 1885.

29 THE OREGON STEAMSHIP COMPANY, Resp'd't,
ag'st
GEORGE K. OTIS, App'l't.

Be it remembered that on the twentieth day of October, in the

year of our Lord one thousand eight hundred and eighty-three, George K. Otis, the appellant in this action, came here into the court of appeals, by John Sessions, his attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and The Oregon Steamship Company, the respondent in said action, afterwards appeared in said court of appeals, by Holmes &
30 Adams, its attorneys, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals having heard this cause argued by Mr. John R. Abney, of counsel for the appellant, and by Mr. George H. Adams, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

31 Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the *court* of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS,
CLERK'S OFFICE, ALBANY, *Nov.* 25, 1885.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[Seal Court of Appeals, State of New York.]

E. O. PERRIN, *Clerk.*

32 *Statement.*

N. Y. Supreme Court.

THE OREGON STEAMSHIP COMPANY *vs.* GEORGE K. OTIS.

This action was begun by service of summons and complaint January 29, 1879.

The defendant's answer was served on the 21st day of February, 1879.

No change of parties has taken place.

The judgment roll is as follows:

Summons.

Supreme Court, City and County of New York.

THE OREGON STEAMSHIP COMPANY, Plaintiff,
against
GEORGE K. OTIS, Defendant.

Place of trial, city and county of New York.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's
33 attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, December 13th, 1878,

HOLMES & ADAMS,
Plaintiff's Attorneys.

Office and post-office address: No. 120 Broadway, New York, N. Y.

Supreme Court, City and County of New York.

THE OREGON STEAMSHIP COMPANY *against* GEORGE K. OTIS.

The plaintiff, by Holmes & Adams, its attorneys, complains of the defendant, George K. Otis, and respectfully shows to this honorable court:

I. During all the times herein mentioned the plaintiff was and now is a corporation duly authorized, incorporated, and existing under and pursuant to the general incorporation laws of the State of Oregon.

II. The defendant, on or about the 2d day of March, 1874, as agent of plaintiff, made and entered into a certain steamboat contract with the United States of America for the transportation of the mails of the United States on route known as No. 46,101, be-
34 tween San Francisco, California, and Portland, Oregon, and back, commencing the 1st day of June, 1874, and ending the 30th day of June, 1878, at twenty-five thousand dollars per annum, and the plaintiff duly performed and complied with the terms and requirements of said contract, and performed the mail service required thereby.

III. At various times between, on, or about the 23d day of October, 1874, and on or about the 20th day of July, 1878, the defendant collected and received from the United States pursuant to said contract the sum of ninety-seven thousand one hundred and thirty-one $\frac{38}{100}$ dollars (97,131.*38*), the difference between said sum and the amount contemplated by the terms of said contract, one hundred thousand dollars ($100,000.00), to wit, the sum of two thousand eight hundred and sixty-eight $\frac{51}{100}$ dollars ($2,868.51) having been de-

ducted and withheld by the United States agreeably to the provisions of said contract and treated as a cash payment.

IV. Of the amount so received and collected by defendant the defendant at various times, between, on, or about the 30th day of October, 1874, and on or about the 6th day of May, 1878, paid to the plaintiff eighty-three thousand six hundred and seventy-five $\frac{24}{100}$ dollars ($83,675.24), which said sum is inclusive of the sum of two thousand five hundred dollars ($2,500), which was retained by the defendant for, and which was his agreed compensation or commission for, services in obtaining said contract and collecting the moneys due from the United States thereunder.

V. Of the amonnt so received and collected by defendant, and for and on account of all the services of defendant to the plaintiff in obtaining said contract and collecting the moneys due from the United States thereunder, defendant was not entitled to have or retain any other or further sum for compensation or commis-
35 sion or otherwise than said sum of two thousand five hundred dollars ($2,500) above referred to, which said sum defendant deducted and retained from the moneys so collected and received by defendant from the United States.

VI. That defendant has not paid over to plaintiff or accounted for thirteen thousand four hundred and fifty-six $\frac{25}{100}$ dollars ($13,456.25) of the moneys so collected and received by defendant from the United States, and has refused to pay over or to account to the plaintiff therefor, and has converted the same to his own use.

VII. Plaintiff has duly demanded of defendant payment of said sum of thirteen thousand four hundred and fifty-six $\frac{25}{100}$ dollars ($13,456.25), which was refused.

Wherefore plaintiff demands judgment against defendant for the sum of thirteen thousand four hundred and fifty-six $\frac{25}{100}$ dollars ($13,456.25), with interest thereon from the 20th day of July, 1878, besides the costs and disbursements of this action.

HOLMES & ADAMS,
Plaintiff's Attorneys.

CITY AND COUNTY OF NEW YORK, *ss:*

Henry Villard, being duly sworn, says he is the president of the Oregon Steamship Company, the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HENRY VILLARD.

Sworn to before me this 12th day of December, 1878.

OLIN J. CLAWSON,
Notary Public, N. Y. Co.

36 N. Y. Supreme Court.

THE OREGON STEAMSHIP COMPANY *against* GEORGE K. OTIS.

The defendant, answering the complaint in the above-entitled action, respectfully shows to this court:

First. He avers that he has no knowledge or information sufficient to form a belief as to whether the plaintiff is or ever was a corporation organized and existing as alleged in the first subdivision of said complaint.

Second. He admits that at or about the time stated in the complaint he made and entered into a contract with the United States Government for carrying its mails on the route for the compensation and period set forth in the complaint, and admits that he received from the said Government, pursuant to said mail contract, the sum of $97,131.49, and that said Government withheld from him and deducted from his agreed compensation, as aforesaid, the sum of $2,868.51, and admits that he has paid for carrying the mails, under said contract, the sum mentioned in the complaint as having been paid by him to the plaintiff.

He also admits that he has not paid over to the plaintiff the sum of $13,456.25 of the moneys so received by him; and he avers as the reason of such non-payment that no part of said last-mentioned sum was or is the property of the plaintiff or justly due to it.

Third. He denies that he made and entered into said contract as agent for the plaintiff.

37 Fourth. He denies each and every allegation of the complaint not hereinbefore specifically admitted or denied.

JOHN SESSIONS,
Defendant's Attorney.

32 Pine street, New York.

CITY AND COUNTY OF NEW YORK, *ss:*

George K. Otis, the defendant in the above-entitled action, being duly sworn, says that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge except as to the mnters therein stated to be alleged upon informatiod and belief, and as to those matters he believes it to be true.

GEORGE K. OTIS.

Sworn to before me this 21st day of February, 1879.

HORACE G. LANSING,
Notary Public, Kings Co., N. Y.

38 At a special term of the supreme court of the State of New York, held at the court-house in the city of New York, on the 5th day of December, 1882.

Present: Hon. A. R. Lawrence, justice.

THE OREGON STEAMSHIP COMPANY, Plaintiff,
vs.
GEORGE K. OTIS, Defendant.

The motion of the plaintiff for an order of reference of the issues herein coming on duly to be heard on the motion herein, dated the 23d day of November, 1882, and on all the pleadings and proceedings herein, and on the stipulation of the attorney for the parties to this action consenting to a reference of the issues in this cause to Horace M. Ruggles, Esq., as sole referee, filed on the 16th day of December, 1879, and upon the order of the general term of this court, entered the 21st day November, 1882, reversing the judgment entered herein on the 9th day of November, 1880, and directing a new trial, and on reading and filing the stipulation that in case a new reference is ordered the court is requested to select as such referee Hon. Joseph S. Bosworth as sole referee: Now, after hearing Mr. George H. Adams for said motion, and Mr. John Sessions opposed—

Ordered, That said motion be, and the same is hereby, granted, and that all the issues herein, and the same are hereby, referred to Hon. Joseph S. Bosworth, as sole referee, to hear and determine the same.

39 New York Supreme Court.

THE OREGON STEAMSHIP COMPANY *against* GEORGE K. OTIS.

To the supreme court of the State of New York:

I, Joseph S. Bosworth, sole referee, appointed by an order made by said court in this action, dated December 5th, 1882, to hear and determine in issues in this action, do hereby respectfully report that I have been attended under the said order by the said parties by their attorneys and counsel herein, and that before proceeding to hear the testimony I was duly sworn as such referee, and that the oath so taken by me as such referee is hereto annexed; that I have heard the proofs and allegations of the said parties respectively and the arguments of their said counsel thereupon, and find the facts to be as hereinafter stated—that is to say:

First. During all the times herein mentioned the plaintiff was, and now is, a corporation duly authorized, incorporated, and existing under and pursuant to the general incorporation laws of the State of Oregon.

Second. The defendant, on or about the 2d day of March, 1874, as agent of the plaintiff, and for its benefit, made and entered into a certain steamboat contract with the United States of America for the transportation of the mails of the United States on route known as No. 46101, between San Francisco, California, and Portland, Oregon,

and back, commencing the first day of July, 1874, and end-
40 ing the 30th day of June, 1878, at twenty-five-thousand dollars per annum, payable quarter-yearly; and the plaintiff duly performed and complied with the terms and requirements of said contract, and performed the mail service required thereby.

Third. At various times between, on, or about the 23d day of October, 1874, and on or about the 20th day of July, 1878, the defendant collected and received from the United States, pursuant to said contract, the sum of ninety-seven thousand one hundred and thirty-one $\frac{49}{100}$ dollars ($97,131.49), the difference between said sum and the amount contemplated by the terms of said contract, being one hundred thousand dollars ($100,000), to wit, the sum of two thousand eight hundred and sixty-eight $\frac{51}{100}$ dollars ($2,868.51) having been deducted and withheld by the United States, agreeably to the provisions of said contract, and treated as a cash payment.

Fourth. Of the amount so received and collected by defendant, the defendant at various times between, on, or about the 30th day of October, 1874, and on or about the 6th day of May, 1878, paid to the plaintiff eighty-three thousand six hundred and seventy-five $\frac{24}{100}$ dollars ($83,675.24), which said sum is inclusive of the sum of two thousand five hundred dollars ($2,500) which was retained by the defendant for, and which was his agreed compensation or commission for, services in obtaining said contract and collecting the moneys due from the United States thereunder and paying over the same to the plaintiff.

Fifth. Of the amount so received and collected by defendant and for and on account of all the services of the defendant to the plaintiff in obtaining said contract and collecting the moneys due from the United States thereunder and paying over the same to the plaintiff, defendant was not entitled to have or retain any other or
41 further sum for compensation or commission or otherwise than said sum of two thousand five hundred dollars ($2,500) above referred to, which said sum defendant deducted and retained from the moneys so collected and received by defendant from the United States.

Sixth. That defendant has not paid over to plaintiff or accounted for thirteen thousand four hundred and fifty-six $\frac{25}{100}$ dollars ($13,456.25) of the money so collected and received by defendant from the United States, and has refused to pay over or to account to the plaintiff therefor, and has converted the same to his own use.

Seventh. Plaintiff has duly demanded of defendant payment of said sum of thirteen thousand four hundred and fifty-six $\frac{25}{100}$ dollars ($13,456.25), which was refused by the defendant. Interest on the said sum of thirteen thousand four hundred and fifty-six $\frac{25}{100}$ dollars ($13,456.25) from July 20th, 1878, to the date of this report amounts to the sum of three thousand seven hundred and nineteen $\frac{90}{100}$ dollars ($3,719.90) and the said principal sum and interest at last said date together amount to the sum of seventeen thousand one hundred and seventy-six $\frac{15}{100}$ dollars ($17,176.15), which last said sum is now justly due and owing from the defendant to the plaintiff.

My conclusions of law upon the facts of this case are that the

plaintiff is entitled to recover in this action of and from the said defendant the said sum of seventeen thousand one hundred and seventy-six $\frac{15}{100}$ dollars ($17,176.15), together with the plaintiff's costs of this action, to be adjusted according to law. And I do hereby order that judgment be entered herein accordingly. All which is respectively submitted.

New York, February 20, 1883.

JOSEPH S. BOSWORTH, *Referee.*

42 Plaintiff's counsel requested the referee to find as follows:

Seventh. That it was agreed between the plaintiff and defendant that out of the mail pay collected and received by him as aforesaid the defendant should retain as his compensation or commission for obtaining said contract and for collecting said mail pay and attending to the same two and one-half per centum of said monies so received and no more; said two and one-half per centum amounted to two thousand five hundred dollars, and was retained by the defendant.

The referee so found. Defendant's counsel duly excepted.

Judgment.

New York Supreme Court, City and County of New York.

THE OREGON STEAMSHIP COMPANY *vs.* GEORGE K. OTIS.

This cause and all the issues therein having been referred to Joseph S. Bosworth, Esq., to hear and determine the same, and his report having been filed, whereby he finds that the defendant collected and received certain sums of money which the plaintiff was entitled to receive, to wit, the sum of $13,456.25; that said sum the defendant refused to pay over or account to the plaintiff for and has converted to his own use; that the plaintiff is entitled to recover of and from the defendant the said sum of $13,456.25, together with the interest thereon, amounting to $3,719.90, amounting in

43 all to the sum of seventeen thousand one hundred and seventy-six $\frac{15}{100}$ dollars, and that plaintiff shall recover its costs, and directs judgment to be entered accordingly: Now, on a motion of Holmes & Adams, plaintiff's attorneys,

It is adjudged that the plaintiff, The Oregon Steamship Company, recover of and from the defendant, George K. Otis, the sum of seventeen thousand one hundred and seventy-six $\frac{15}{100}$ dollars, together with fourteen hundred forty-two and $\frac{78}{100}$ dollars, costs and disbursements taxed herein, in all amounting to the sum of eighteen thousand six hundred [and] eighteen and $\frac{93}{100}$ dollars.

Notice of Appeal.

Supreme Court, New York County.

OREGON STEAMSHIP COMPANY *against* GEORGE K. OTIS.

Take notice that the above-named defendant hereby appeals to the general term of this court from the judgment entered in this

action in this court on the 5th day of March, 1883, in favor of the plaintiff against the defendant for $18,618.93.

Dated March 6th, 1883.

JOHN SESSIONS,
Defendant's Attorney, 32 Pine Street, New York City.

To Holmes & Adams, Esqs., plaintiff's attorneys.
To Patrick Keenan, clerk of the city and county of New York.

44 This cause came on to be heard before Joseph S. Bosworth, Esq., as sole referee. The plaintiff, to maintain the issues on its part, offered in evidence the articles of incorporation of the plaintiff duly certified, and the same was marked in evidence, Ex. 1.

It is admitted by the defendant that the plaintiff is a corporation duly organized on the 25th day of May, 1872, and existing under the laws of the State of Oregon.

Plaintiff's counsel reads in evidence Laws of Oregon, chapter 7 of Miscellaneous Laws, title 1, sections 2 and 3.

WILLIAM ARNOUX, a witness on behalf of the plaintiff, being duly sworn, testified as follows:

I am a clerk of the executive of the Western Union Telegraph Company. I have been engaged in that position since 1866.

I have with me the *subpœna duces tecum* served on the company by the plaintiff, describing certain telegrams running from October, 1874, to September, 1876.

Q. Have you those telegrams with you?

A. No, sir; they have been destroyed.

Q. When were they destroyed; under what circumstances?

A. At that time our rule was to keep telegrams for two years; we destroyed them at the end of that time. I know that at the end of 1875 a number were destroyed. In 1877 an executive order was issued that all the telegrams should be destroyed after six months. We only keep them six months now.

Q. Then you know those telegrams called for in this subpœna have been destroyed?

A. I know they been destroyed. About the time we moved into the new building we only had arrangements to keep them so
45 long. They accumulated, and when the space is filled up they have to be destroyed.

The Subpœna Offered and Marked in Evidence as Ex. 2.

The People of the State of New York to manager in New York city or other agent of the Western Union Telegraph Company, Greeting:

We command you that, all business and excuses being laid aside, you appear and attend before Horace M. Ruggles, Esq., referee, at his office No. 120 Broadway, in the city of New York, duly appointed herein by order of the supreme court of the State of New York, on the 20th day of January, 1880, at 2 o'clock in the after-

noon, to testify and give evidence in a certain action now pending undetermined in the said court between the Oregon Steamship Company, plaintiff, and George K. Otis, defendant, on the part of the plaintiff, and that you bring with you, and produce at the time and place aforesaid, certain telegrams, copies or transcripts of same, described as follows, to wit:

Dated New York, October 10, 1874, signed Geo. K. Otis to W. Norris, San Francisco.

Dated New York, December 24, 1874, signed Geo. K. Otis to Wm. Norris, San Francisco.

Dated New York, February 16, 1875, signed Geo. K. Otis to Wm. Norris, San Francisco.

Dated New York, February 15, 1875, signed Geo. K. Otis to Wm. Norris, San Francisco.

Dated New York, February 19, 1875, signed George K. Otis to W. Norris, San Francisco.

Dated New York, July 26, 1875, signed George K. Otis to Wm. Norris, San Francisco.

Dated San Francisco, February 13, 1875, signed Wm. Norris to Geo. K. Otis, New York.

Dated San Francisco, February 15, 1875, signed W. N. to Geo. K. Otis, New York.

46 Dated San Francisco, February 15, 1875, signed Wm. Norris to Geo. K. Otis, New York.

Dated San Francisco, February 23, 1875, signed Wm. Norris to Geo. K. Otis, New York.

Dated San Francisco, July 30, 1875, signed Wm. Norris to Geo. K. Otis, New York.

Dated San Francisco, Aug. 3, 1875, signed Wm. Norris to Geo. K. Otis, New York.

Dated New York, July 31, 1875, signed Geo. K. Otis to Wm. Norris, San Francisco.

Dated New York, September 30, 1876, signed Geo. K. Otis to Wm. Norris, San Francisco.

Now in your custody, and all other deeds, evidences and writings which you have in your custody or power concerning the premises. And for a failure to attend you will be deemed guilty of contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness the Hon. Noah Davis, presiding justice of said court, this 6th day of January, 1880.

WM. A. BUTLER, *Clerk.*

HOLMES & ADAMS,
Plaintiff's Attorneys, 115 *Broadway.*

Plaintiff's counsel read in evidence the deposition of David P. Thompson, a witness examined on behalf of defendant, by commission at Portland, Oregon.

Direct examination:

I am 45 years old; I am mayor of Portland, Oregon, where I reside.

I know the parties to this suit, and have known them since 1873; I never was an officer or stockholder of the plaintiff company.

I was informed by George K. Otis and by Holladay himself
47 that Ben. Holladay was president of the Oregon Steamship Co. during the latter part of 1873 and the early part of 1874.

I do not know when such connection commenced, and I know nothing more on the subject.

During the early part of the year 1874 and prior to March 2d, 1874, I received from Ben. Holladay, who was then in Portland, Oregon, and I was in Washington city, letters and telegrams asking me to bid on the contract for carrying the mail by steamer from San Francisco, California, to Portland, Oregon, and he asked me to make the necessary deposit of 5 per cent. on the bid.

I have not the letters or telegrams in my possession or under my control; communication was made by letter and telegram from Ben. Holladay.

I know nothing whatever of the arrangements, if any, between Ben. Holladay and George K. Otis.

I know nothing more.

Cross-examination:

Witness testified as follows:

I am not connected with the defendant by blood, marriage, or business. We have now no business relations with each other. I have never received from any person whatever any communications, written or verbal, respecting the evidence I might give in this case, or the answers I might make to the interrogatories herein.

I am answering entirely from memory and have prepared no written answers.

This examination was made at the office of the clerk of the U. S. district court, and no one was present except casual callers.

I was instructed by Ben. Holladay to bid on the contract; I understood that it was for the benefit of Ben. Holladay, and that I was acting as his agent in the matter.

Holladay told me that Otis was his agent, but directed me not to pay him any money, but afterwards countermanded that
48 order; I had no instructions from Holliday to substitute Otis for myself as contractor; this was agreed upon between Otis and myself for convenience in giving bonds, as I could go on his bond for the amount required, but he could not go on my bond; Otis said it would make no difference which of us bid.

Plaintiff's counsel offers in evidence certified copy of proposal of George K. Otis to carry mails upon the route mentioned, dated February 4, 1874, and the same was marked Exhibit 3; the acceptance of the same by the Post Office Department, the affidavit of said Otis, and the guarantee and certificate.

EXHIBIT 3.

Proposal.

The undersigned, George K. Otis, whose post-office address is Brooklyn, county of Kings, State of N. Y., proposes to convey the mails of the United States from July 1, 1874, to June 30, 1878, on route No. 46,101, between San Francisco and Portland, Oregon, under the advertisement of the Postmaster General, dated October 1, 1873,

"With celerity, certainty, and security"
(Law of June 8, 1872),

for the annual sum of twenty-five thousand dollars.

This proposal is made with full knowledge of the distance of the route, the weight of the mail to be carried, and all other particulars in reference to the route and service, and also after careful examination of the laws and instructions attached to advertisement of mail service.

Dated February 2, 1874.

GEORGE K. OTIS, *Bidder.*

49 *Guarantee.*

The undersigned, Thomas Hood, residing at Washington, D. C., and D. P. Thompson, Oregon City, State of Oregon, undertake that if the foregoing bid for carrying the mail on route No. 46101 be accepted by the Postmaster General, the bidder will, prior to the 1st June, 1874, enter into the required obligation, or contract, to perform the service proposed with good and sufficient sureties.

This we do understanding distinctly the obligations and liabilities assumed by guarantors.

Dated February 2, 1874.

THOMAS HOOD,
D. P. THOMPSON.

Certificate.

The undersigned, postmaster at Washington, D. C., certifies under his oath of office that he is acquainted with the above guarantors, and believes them to be men of property, and able to make good their guarantee, and that bidder and guarantors are above the age of 21 years.

Dated February 2, 1874.

J. M. EDMUNDS, *P. M.*

Section 247 of an act of Congress approved June 8, 1872, provides "That any postmaster or other officer of the Post Office Department who shall affix his signature to the certificate of the sufficiency of guarantors or sureties before the guarantee or contract is signed by the guarantors or sureties, or shall knowingly make any false or illusory certificate, shall be forthwith dismissed from office and shall be deemed guilty of a misdemeanor, and shall, on conviction thereof,

be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both.

Bids of $5,000 and upward must be accompanied by a certified check or draft on some solvent national bank equal to five
50 per centum on the present annual pay on the route, or, in case of new service, not less than 5 per centum of one year's pay proposed in bid. (Section 253, Act of June 8, 1862.)

The proposal must be signed by the bidder or bidders, the guarantee by not less than two guarantors, and the certificate by a postmaster, and the mailing stamp of his office must be affixed, showing the date of signing.

Direct to the "Second Assistant Postmaster General, Post Office Department, Washington, D. C.," marked "Proposals, State of ——."

The postmasters must not sign the certificate until the sum of the bid is inserted, and the bid and guarantee signed by all the parties and dated.

Oath Required by Section 246 of an Act of Congress Approved June 8, 1872, to be Affixed to each Bid for Carrying the Mail, and to be taken before an Officer Qualified to Administer Oaths.

I, George K. Otis, of Brooklyn, N. Y., bidder for conveying the mail on route No. 46101, from San Francisco to Portland, do swear that I have the ability, pecuniarily, to fulfill my obligation as such bidder; that the bid is made in good faith, and with the intention to enter into contract and perform the service in case said bid shall be accepted; and that the signatures of the guarantors thereto are genuine, and that I believe the said guarantors to be pecuniarily responsible for, and able to pay, all damages the United States shall suffer by reason of my failing to perform my obligations as such bidder.

GEORGE K. OTIS.

Sworn to and subscribed before me, a notary public for the District of Columbia, this second day of February, A. D. 1874,
51 and in testimony thereof I hereunto subscribe my name and affix my official seal the day and year aforesaid.

[SEAL.] J. M. McKENNEY,
Notary Public.

Plaintiff's counsel offers in evidence certified copy of contract between the U. S. Post Office Department and George K. Otis, dated March 2d, 1874, and this is marked Exhibit 4.

EXHIBIT 4.

S.—1. (1.)

Steamboat Contract.

No. 46101. $25,000 per annum.
BROOKLYN, KINGS CO., N. Y.

This article of contract, made the second day of March, in the year

one thousand eight hundred and seventy-four, between the United States of America (acting in this behalf by their Postmaster General) and George K. Otis and Ben. Halladay and David P. Thompson, sureties, witnesseth:

That whereas Geo. K. Otis has been accepted, according to law, as contractor for transporting the mail on route No. 46101, from San Francisco, Cal., to Portland, Oregon, and back, four trips per month, and oftener if boats run, in suitable and safe steamboats, by a schedule satisfactory to the Department, at twenty-five thousand dollars per year for and during the term commencing the first day of July, in the year one thousand eight hundred and seventy-four, and ending with the thirtieth day of June, in the year one thousand eight hundred and seventy-eight:

Now, therefore, the said contractor and his sureties do jointly and severally undertake, covenant, and agree with the United States, and do bind themselves—

1st. To carry said mail within the times fixed in the an-
52 nexed schedule of departures and arrivals, and so carry until said schedule is altered by the authority of the Postmaster General of the United States, as hereinafter provided, and then to carry according to said altered schedule. 2d. To carry said mail in a safe and secure manner, free from wet or other injury, in steamboats and in a separate and convenient apartment to be suitably fitted up under order of the Department, at the expense of the contractor, for the assorting and safe-keeping of the mail, and for the sole and exclusive occupation, use, and accommodation of the Post Office Department and its mail agent, if the Postmaster General shall require it, and such mail agent is to be conveyed without further charge. In case the contractor fails to furnish such suitable accommodations the Department shall have the right to provide a separate or convenient apartment or other suitable accommodations at the expense of the contractor. 3d. To take the mail and every part of it from, and deliver it and every part of it into, each post office on the route, or that may thereafter be established on the route, provided it be not more than one-quarter of a mile from the steamboat landings, and into the post office at each end of the route, and to the mail carriers on connecting routes.

They also undertake, covenant, and agree with the United States, and do bind themselves, jointly and severally, as aforesaid, to be answerable for the person to whom the said contractor shall commit the care and transportion of the mail, and accountable to the United States for any damages which may be sustained by the United States through his unfaithfulness or want of care; and that the said contractor will discharge any carrier of said mail whenever required to do so by the Postmaster General; also, that he will not transmit by himself or his agent, or be concerned in transmitting commercial intelligence more rapidly than by mail, and that he will not carry,
out of the mail, letters or newspapers which should go by
53 post; and that he will not knowingly convey any person carrying on the business of transporting letters or other mail matter without the consent of the Department; and further, that

said contractor will convey, without additional charge, post-office blanks, mail bags, and the special agents of the Department on the exhibition of their credentials.

They further undertake, covenant, and agree with the United States that the said contractor will collect quarterly, if required by the Postmaster General, of postmasters on said route the balances due from them to the United States, and faithfully render an account thereof to the Postmaster General in the settlement of quarterly accounts, and will pay over to the United States all balances remaining in his hands.

For which services, when performed, the said Geo. K. Otis, contractor, is to be paid by the said United States the sum of twenty-five thousand dollars a year, to wit, quarterly, in the months of May, August, November, and February, through the postmasters on the route, or otherwise, at the option of the Postmaster General; said pay to be subject, however, to be reduced or discontinued by the Postmaster General, as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may increase the service or change the schedule, he allowing a *pro rata* increase of compensation within the restrictions imposed by law for the additional service required; but the contractor may, in case of increased service or change of schedule, relinquish the contract on timely notice, if he prefers it to the change; also that the Postmaster General may curtail or discontinue the service in whole or in part, he allowing one month's extra pay on the amount dispensed with.

It is hereby also stipulated and agreed by the said contractor and his sureties that in all cases there is to be a forfeiture of the
54 pay of a trip when the trip is not run, and of not more than three times the pay of a trip when the trip is not run and no sufficient excuse for the failure is furnished; a forfeiture of at least one-fourth part of it when the running is so far behind time as to lose connection with a depending mail, unless it is shown that the same was not caused by neglect or want of proper skill or misconduct; and a forfeiture of a due proportion of it when a grade of service is rendered inferior to the mode of conveyance above stipulated, and that these forfeitures may be increased into penalties of a higher amount, according to the nature or frequency of the failure and the importance of the mail; also that fines may be imposed upon the contractor, unless the delinquency be satisfactorily explained to the Postmaster General in due time for failing to take from or deliver at a post office the mail, or any part of it; for suffering it to be wet, injured, lost, or destroyed; for carrying it in a place or manner that exposes it to depredation, loss, or injury by being wet or otherwise; for refusing, after demand, to convey a mail by any steamboat which the contractor runs, or is concerned in running, on the route beyond the number of trips above specified; or for not arriving at the time set in the schedule, unless not caused by neglect or want of proper skill or by misconduct; and for setting up or running an express to transmit letters or commercial intelligence

in advance of the mail, or for transporting knowingly, or after being informed any one [is] engaged transporting letters or mail matter in violation of the laws of the United States, a penalty of fifty dollars may be exacted for each offense and for each article so carried.

And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster General may annul the contract for repeated failures; for violating the post-office laws; for disobeying the instructions of the Department; for refusing to discharge a carrier, or any other person having charge of the mail by their direction, when required by the Department; for setting up or running an express, as aforesaid, or for transporting persons conveying mail matter out of the mail, as aforesaid; or whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and this contract shall in all its parts be subject to the terms and requisitions of an act of Congress passed on the 21st day of April, in the year of our Lord one thousand eight hundred and eight-, entitled "An act concerning public contracts."

55

In witness whereof the said Postmaster General has caused the seal of the Post Office Department to be hereto affixed, and has attested the same by his signature, and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names respectively.

JOHN A. J. CRESWELL,
Postmaster General.

Signed, sealed, and delivered by the Postmaster General in the presence of—
WM. F. S. DUVAL.

And by the other parties hereto in the presence of—
R. H. FOWLER,
GEORGE F. OTIS,
Witnesses.

GEORGE K. OTIS, *Contractor.*	[L. S.]	April 8, 1874.
B. M. HOLLADAY, *Surety.*	[L. S.]	April 9, 1874.
DAVID P. THOMPSON, *Surety.*	[L. S.]	April 9, 1874.

56

I hereby certify that I am well acquainted with Ben Holladay and David P. Thompson and the condition of their property, and that after full investigation and inquiry I am well satisfied that they are good and sufficient sureties for the amount in the foregoing contract.

CHARLES C. SALHT,
Postmaster at Brooklyn, N. Y.

Sureties approved by Hon. J. W. Nesmith and Hon. S. O. Houghton, June 2, 1874.

W. R.

The Schedule of Departures and Arrivals.

Leave
Arrive at
Leave
Arrive at
Leave
Arrive at
Leave
Arrive at

Certificate of the Oath of Mail Contractors and Carriers, Required by Act of Congress of June 8, 1872.

I, George K. Otis, being "employed in the care, custody, and conveyance of the mail" (as contractor) on route No. 46101, from San Francisco, Cal., to Portland, State of Oregon, do swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of the post offices and post roads within the United States, and that I will honestly and truly account for and pay over any moneys
57 belonging to the said United States which may come into my possession or control. So help me God.

GEORGE K. OTIS.

Sworn before the subscriber, postmaster for the city of Brooklyn, this tenth day of April, A. D. 1874, and I also certify that the person above named is above the age of twenty-one years, to the best of my knowledge and belief.

CHARLES C. SALHT, *P. M.*

Plaintiff's counsel offers in evidence the account between the Post Office Department and George K. Otis, contractor, under contract Exhibit 32, with the authentication by the sixth auditor, marked Exhibit 46.

Ex. 32.

Dr. *George K. Otis, Contractor, in Account with the United States.* Cr.

Route.			Route.		
46101	To warrant on N. Y., favor G. K. Otis, dated Oct 23, 1874	6,250 00	46101	By transportation, 3rd q'r, 1874	6,250 00
"	" " " " " Jan. 18, 1875	6,250 00	"	" " 4th " "	6,250 00
"	" deduction 1st q'r, '75	3,645 90	"	" " 1st " 1875	6,250 00
"	" warrant on N. Y., favor G. K. Otis, dated July 14, 1875	2,604 10	"	" " 2nd " "	6,250 00
"	" " " " " Nov. 12, "	6,250 00	"	" " 3rd " "	6,250 00
"	" " " " " Jan. 31, 1876	6,250 00	"	" " 4th " "	6,250 00
"	" deduction 4th q'r, 1875	5,989 59	"	" " 1st " 1876	6,250 00
"	" warrant on N. Y., favor G. K. Otis, dated Ap'l 20, 1876	260 41	"	" " 2nd " "	6,250 00
"	" " " " " July 14, "	6,250 00	"	" " 3rd " "	6,250 00
"	" " " " " Oct. 20, "	6,250 00	"	" " 4th " "	6,250 00
"	" " " " " Jan. 17, 1877	6,250 00	"	" " 1st " 1877	6,250 00
"	" " " " " Ap'l 19, "	6,250 00	"	" " 2nd " "	6,250 00
"	" " " " " July 18, "	6,250 00	"	" " 3rd " "	6,250 00
"	" " " " " Oct. 20, "	6,250 00	"	" " 4th " "	6,250 00
"	" " " " " Jan. 17, 1878	6,250 00	"	" " 1st " 1878	6,250 00
"	" " " " " Ap'l 16, "	6,250 00	"	" " 2nd " "	6,250 00
"	" warrant on Boston, favor of R. B. Conant, cashier of Eliot National Bank of Boston, assignee of G. K. Otis, dated July 20, 1878	4,250 00			
		2,000 00			
		100,000 00			100,000 00

Office of the auditor of the Treasury for the Post Office Department, Washington, D. C., Nov. 28, 1878.

J. M. McGREW, *Auditor.*

59 Plaintiff's counsel read in evidence deposition of WILLIAM NORRIS, taken at San Francisco by commission, as follows:

My age is 50 years and upwards; my occupation is secretary of the Spring Valley Water Works, and I reside in San Francisco. I know the parties to this action; I have known the defendant for about 12 years. I was agent of the Oregon Steamship Company in San Francisco from some time in the summer of 1872 for about three years, and my duties were the ordinary duties of an agent of a steamship company. My instructions came from the principal office of the company, situated at Portland, Oregon. In the financial management of the company's affairs I also received instructions from Milton S. Latham, of San Francisco, who represented the foreign creditors of the company.

The principal business of the plaintiff is that of carrying passengers and freight between San Francisco and Portland, Oregon. The company was organized in 1872, and is still in existence.

The plaintiff has, among other things, been engaged in carrying the United States mails between San Francisco and Portland; also between Portland and Sitka, Alaska. The plaintiff was carrying the mails between these ports when I first became connected with it; continued to do so during the entire period of my connection with it, and I believe that the company is still carrying the mails between San Francisco and Portland.

During the time that I was agent I do not think that any contracts were made by the United States or the Post Office Department directly with the company, but the contract for the route between San Francisco and Portland was taken, as I believe, in the name of Ben. Holliday, and that for the route between Portland and Sitka in the name of George K. Otis—or possibly both might have been
60 taken in the name of George K. Otis—but further details of the contracts I cannot give, as I have never seen either the original contracts or copies of them.

As to payments for the mail services prior to July 1, 1874, I know that the plaintiff received certain sums of money on account of the contracts from time to time.

Before the plaintiff corporation was organized the mails between San Francisco and Portland were carried by the North Pacific Transportation Company, and at the time the plaintiff corporation was organized all the rights, contracts, and privileges in the carrying of the mails between these ports were understood to be transferred to the plaintiff.

I will modify my statement as to the Sitka contract by saying that I believe the first contract for mail service between Portland and Sitka was made since the organization of the plaintiff.

I do not know that there was any written assignment of the mail contracts, but only that it was understood when the North Pacific Transportation Company transferred its steamships to the plaintiff that the plaintiff should continue to perform the mail service and receive compensation therefor.

The defendant objected to this evidence as to what was understood

to be transferred. Referee overruled the objection, stating as the ground therefor as follows: "If it is made to appear in the progress of this trial that these contracts about which this witness was speaking, and which were in existence when this company was formed, were not in the name of Otis, then it has no significance as testimony, and will not disturb the referee in coming to a conclusion." Defendant's counsel excepted.

The plaintiff carried the U. S. mails between the ports of San Francisco and Portland subsequent to July 1, 1874, and to my
61 certain knowledge so long as I continued to be the agent of the plaintiff—and, I believe, continuously from July 1st, 1874, to June 30th, 1878. Such service consisted in transporting the U. S. mails on first-class steamships between San Francisco and Portland, either three or four times each month.

Q. Under what contract or arrangement did the plaintiff carry said mails during the period last named; was such contract made in name between the United States Post Office Department and the defendant; if yea, how came it to be made in the name of the defendant; when was such contract made and where; had the defendant, previous to that time, been in the employ of the plaintiff in any capacity; if yea, in what capacity and for what time; was the defendant, at the time of the making of said contract, in the employ of the plaintiff; if yea, in what capacity, and where and what were his duties?

A. Said mails were carried by the plaintiff under a contract between the Post Office Department and either Ben. Holladay or George K. Otis, as I have been informed. I have never seen the contracts, and when they were made I was absent in Europe.

The defendant objected to this answer. Overruled. Exception.

The defendant had, previous to that time, been employed by the plaintiff to collect the mail pay at Washington—from the time that the Oregon Steamship Co. was organized, in 1872, and was employed continuously for the same purpose up to the time when my agency ceased

The defendant objected to this answer. Objection overruled. Defendant excepts.

I know that certain sums of money were received by the plaintiff for the mail service from the 1st day of July, 1874, up to the
62 time when my connection with the plaintiff ceased, and that such sums of money were collected from the Post Office Department for the plaintiff by George K. Otis.

The defendant objected. Objection overruled. Defendant excepted.

Q. Did the defendant receive any part of the compensation or money paid by said Government on account of said services last mentioned? If yea, what part, and how was it paid or allowed to the defendant, and when, and why did the defendant receive such part? Explain fully.

A. I know that defendant retained a part of the money paid by said Government on account of said mail service, which defendant claimed as compensation for his own services; but it is impossible for me to tell what part he retained without referring to said books of account, which are not in my possession.

Defendant objected to this answer. Referee overruled the objection. Defendant excepted.

I know of no compensation paid to the defendant during the time I was agent of the plaintiff other than that referred to in my answer last above, nor do I know of any agreement, either verbal or in writing, to pay defendant any other compensation or salary.

Defendant's counsel objected. Objection overruled. Defendant's counsel excepted.

I arrived in New York from Europe in May, 1874, and remained there about a fortnight; I was suffering from extreme nervous exhaustion and was utterly unable to give any attention to business matters; the only conversation I had with defendant with reference to his compensation was on the cars at the railroad station on the evening that I left for San Francisco, which evening was
63 early in June, 1874; Mr. Otis, the defendant, spoke to me of his services in attending to mail matters for the company at Washington and to any other matters of business which the company might have in the East; he also spoke of his services in attending to private business matters for Mr. Holladay.

I think he mentioned a round sum for all these services, *of* which he thought the steamship company ought to pay $175 a month; I fully agreed with him that his services were valuable and that he was entitled to full compensation for them; I do not recollect making any specific arrangement with him—am confident that I did not; but I remarked that I would talk with Mr. Holladay about the matter, and doubtless some satisfactory arrangement could be made; I don't think I mentioned the matter at that time to Mr. Holladay; my nervous system at that time was in a very precarious condition, and for some months after my return to San Francisco I was unable to attend to business, although I was almost daily at the office of the steamship company; Mr. Ben. Holladay, the president of the steamship company at that time, left New York upon the same train with me, and was on the cars at the time of this conversation with Mr. Otis, but was not present; I was at that time, as I have said before, the San Francisco agent of the Oregon Steamship Company.

Defendant objected. Objection overruled. Exception.

I had forgotten entirely the conversation with Mr. Otis in New York until reminded of it by a telegram in answer to one of my own, in which he explains his reasons for retaining a portion of the mail pay for his services; I have had no other communication, either verbal or in writing, with the defendant, except such as is contained in the copies of letters and telegrams which are annexed to this deposition.

64 And I now produce and hand to the commissioner, to be attached to my deposition, certain telegraphic messages received by me from George K. Otis, the defendant, which are marked Exhibits 3, 4, 17, 11, 18, 23, and certain other telegraphic messages received by me from Ben. Holladay, and marked Exhibits 10, 24, all of which messages were received by me between August 1, 1874, and July 28, 1875.

In the exhibits the word "Evergreen" means "Ben. Holladay," and "David" means "Milton S. Latham."

I also now produce and hand to the commissioner, to be attached to my deposition, copies of certain telegraphic messages sent by me to George K. Otis, the defendant, which are marked Exhibits 8, 12, 13, 19, 25, 27, and copies of certain other telegraphic messages sent by me to Ben. Holladay, which are marked Exhibits 9, 15, 30, 37, 35, 36, 34, 33, all of which messages were sent by me to these parties between February 1, 1875, and July 27, 1875. In Exhibit 12 the word "Comet" means Ben. Holladay.

All of these copits of messages sent by myself to the defendant and Ben. Holladay are taken from the press copy telegraph book, with the exception of Exhibits 12 and 15, of which I do not find press copies, but the exhibits themselves, pasted into the books.

I also produce, to be attached as aforesaid, the copy of a letter sent by myself to Ben. Holladay, February 13, 1875, which is marked Exhibit 39; also a copy of a letter sent by myself to the defendant, February 15, 1875, marked Exhibit 14; also a copy of a letter sent by myself to the defendant, either February 15th, 1875, or February 25th, 1875. I think upon the latter date, but the press copy of the date is illegible; this latter is marked Exhibit 16.

65 The telegram from defendant marked Exhibit 11 was in answer to a telegram sent by me to the defendant, viz., Exhibit 8. To said telegram from defendant I replied by the telegram marked Exhibit 13.

I had communicated both by letter and telegraph with Ben Holladay. I do not know whether these communications were known to the defendant. Mr. Ben. Holladay was at that time the president of the Oregon Steamship Company; he had occupied that position since the organization of the company.

I have had no communication with the defendant during the period mentioned and up to the present time with reference to the affairs of the plaintiff other than I have already explained, nor do I recollect nor know of any communications between plaintiff and defendant during the period mentioned other than such as I have already explained.

I have ascertained that the period of my agency of the Oregon Steamship Company was from the time the company was organized in 1872 up to June, 1876. I also have learned during this investigation of my papers that a contract for carrying the mails from Portland to Sitka had existed for four years previous to July 1, 1874; that such mails were carried at first by the North Pac. Trans. Co.; but after said company sold out to the Oregon S. S. Co. in 1872 the mails were carried by the latter. I know that the defendant col-

lected the mail pay for the Sitka service and transmitted the same to the Oregon Steamship Company in the same general way that he did the pay for the Portland service during the two years from June, 1872, to July, 1874. I do not know, however, what compensation the defendant received for these services, nor can I ascertain without examining the books of the plaintiff, which are not in my possession.

I know that the Sitka contract was renewed in 1874. I think that this contract stood in the name of the defendant, but was informed by Mr. Ben. Holladay that it was for the benefit of
66 the plaintiff, and the various communications which I have produced relate to both the Portland and the Sitka contracts.

The witness produces another letter written upon February 25, 1875, to the defendant, and which is marked Ex. 23, and states that Ex. 18 was written on February 15, 1875.

The witness produces an extract from a letter which he says he wrote to Ben. Holladay February 25, 1875, marked Ex. 24.

In all telegrams the words "Evergreen" and "Comet" mean "Ben. Holladay;" "David" means "Milton S. Latham," and "W. N." means "William Norris."

The witness also produces telegram from the defendant, dated July 31, '75, marked Ex. 35, and says this telegram was in answer to one of my own, dated July 30, 1875, which is already marked Exhibit 25.

On cross-examination the witness testified as follows:

I know that the plaintiff carried the United States mails
67 between San Francisco and Portland prior to July 1, 1874, because I was at that time agent of the steamship company; as to the contracts of the mail service during that period, I know nothing more than what is contained in my answers first above given on cross-examination.

I know that mail service was performed for the Post Office Department by the Oregon Steamship Company prior to July 1, 1874, and that the company received certain sums of money for the performance of this service, which sums of money were collected by Otis, the defendant, from the Department at Washington. I have personal knowledge of these facts, because I was the San Francisco agent of the plaintiff at that time.

I have personal knowledge of the matters referred to as to the North Pacific Trans. Co., because I was vice-president of the latter company when they sold their steamers to the plaintiff, and soon after the organization of the plaintiff I was appointed its San Francisco agent.

I do not think that there was any written assignment of mail contracts or privileges from the former corporation to the plaintiff.

My knowledge of the capacity in which the defendant was acting in the making of the contract of 1874 was derived principally from Ben. Holladay; also from Otis himself, in my conversation with him at the railroad station in New York in June, 1874, I received the impression that said contracts were in favor of the plaintiff. My

duties as agent of the plaintiff at San Francisco required me to have personal knowledge of these matters.

Defendant objected to this evidence. Objection overruled. Defendant excepted.

The principal financial operations of the plaintiff were carried on at San Francisco, where I was agent, so that I was fully informed as to the receipts of the company.

68 I have not seen the defendant since I left New York, in June, 1874.

In February, 1875, a certain sum of money was remitted to defendant by myself under the following circumstances: At that time the company was largely indebted, and needed the mail pay which was in the hands of Mr. Otis, and, fearing that he would retain the full amount of the pay, I telegraphed him to remit the full amount collected, and I would remit him $1,400, which I did upon my own responsibility entirely. Afterwards this amount was charged to the "mail contract" in the books of the plaintiff.

My only knowledge of the telegram from the defendant of February 15, 1875, is that I received it from the office of the telegraph company at San Francisco, and that the name of the defendant is attached to it; I cannot state from personal knowledge that he received any messages from me, because I cannot testify as to the accuracy with which the employees of the Western Union Telegraph Co. perform their duties.

The following telegrams and the letters annexed to said deposition of William Norris were then read in evidence by the plaintiff's counsel, and marked exhibits by the numbers as shown:

EXHIBIT No. 3.

(Received at San Francisco, Aug. 12, 1874.)

WASHINGTON, D. C., *Aug.* 11, 1874.

To W. Norris:

Your postmaster has not reported to Department service on route to Portland for July; until this is done I cannot get checks deposited on my bid. Please have this attended to. Also, no report from Sitka for commencement of July service.

GEO. K. OTIS.

69 EXHIBIT No. 4.

(Received at San Francisco, Oct. 10, 1874.)

NEW YORK, *Oct.* 10, 1874.

To W. Norris:

Can't collect mail pay until certificates from both ends of routes are received by Department. Evergreen [Holliday] telegraphed me to notify David [Latham] to draw for same when collected. Who is to draw—you or David?

GEO. K. OTIS.

EXHIBIT No. 5.

(Received at San Francisco, Nov. 18, 1874.)

NEW YORK, *Nov.* 18, 1874.

To W. Norris, ag't:

You can draw at sight on me for seventy-five hundred and seven ($7,507) dollars — fifty (50) cents, currency, mail pay on Sitka route for quarter ending thirtieth September. A deduction of one thousand dollars has been made by the Department for failure to supply Fort Townsend and San Juan, which I hope to get back.

GEO. K. OTIS.

EXHIBIT No. 6.

(Received at San Francisco, Feb'y 3, 1875.)

WASHINGTON, D. C., *Feb'y* 3, 1875.

To W. Norris, ag't:

You can draw on me at sight, in currency, at New York, for fifty-nine hundred and fifty-three dollars, mail pay, San Francisco to Portland, quarter ending January first; have deducted two and one-half per cent. and one hundred and thirty-one dollars' interest on certified checks put up when I bid.

GEO. K. OTIS.

70 EXHIBIT No. 7.

(Received at San Francisco, Feb'y 12, 1875.)

NEW YORK, *Feb'y* 12, 1875.

To W. Norris, ag't:

Have collected fifty-eight hundred dollars, mail pay, Portland to Sitka, quarter ending December thirty-first; twenty-nine hundred was deducted for a trip missed; the Oregon Steamship Company have not paid me their proportion of my salary from June first to Feb'y first. I have deducted this and two and one-half per cent. collection. You can draw on me at sight balance, forty-two hundred and fifty-five ($4,255) dollars, currency. As soon as I get evidence from Portland that the trip was lost by reason of stress of weather the deduction will be refunded.

GEO. K. OTIS.

EXHIBIT No. 7.

FEB'Y 13, 1875.

To Geo. K. Otis, 35 William St., New York:

Don't understand about salary Oregon Steamship Company. Please explain.

WM. NORRIS.

EXHIBIT No. 9.

FEB'Y 13, 1875.

To Ben. Holladay, 817 Fifteenth street, Washington, D. C.:

Latham positively objects to Otis drawing salary on account Oregon Steamship Company, and directs me to draw on Otis for full amount mail pay, less two and a half per cent. commission for collecting.

WM. NORRIS.

71 EXHIBIT No. 10.

(Received at San Francisco, Feb'y 13, 1875.)

WASHINGTON, D. C., *Feb'y* 13, 1875.

To Wm. Norris:

I never agreed to pay Otis any salary for steamship company or heard of it before; thought he was drawing commission. You know this matter is not in my hands.

BEN. HOLLADAY.

EXHIBIT No. 11.

(Received at San Francisco, Feb. 15, 1875.)

NEW YORK, *Feb.* 15, 1875.

To W. Norris, ag't:

You will remember that you fixed my salary at six thousand per year, of which the steamship company was to pay one hundred and seventy-five per month; they now owe me this proportion from June 1st.

GEO. K. OTIS.

EXHIBIT No. 12.

FEB. 15, 1875.

Geo. K. Otis:

I have no recollection of making any arrangement about salary. I have no authority from steamship company or Cornet [Holladay] to do so, and do not know what the salary is for. If there is any such understanding on your part you must at once talk with Evergreen [Holladay], as I can take no responsibility in the matter.

W. N.

EXHIBIT No. 13.

FEB. 15, 1875.

Geo. K. Otis, 35 William street, New York:

Latham positively refuses to allow any salary from Oregon
72 Steamship Company. He has instructed me to draw for full amount, less commission for collecting. I have drawn on you this date, at one day sight, for fifty-six hundred and fifty-five dollars.

(Signed) WM. NORRIS.

EXHIBIT No. 14.

SAN FRANCISCO, *Feb'y* 15, 1875.

Geo. K. Otis, Esq.

DEAR OTIS: I did not understand your telegrams in reference to amounts I should draw for last quarter mail pay, and telegraphed Holliday in reference to it. I have received the following from him: "I never agreed to pay Otis any salary for steamship company or heard of it before; thought he was drawing commission. You know this matter is not in my hands." All the matters of the Oregon Steamship Co. go through Latham's inspection, and he positively refuses to allow any salary. He thinks the commission for collecting the mail pay, amounting to about $1,500 per annum, is ample compensation. He instructed me this morning to draw on you for the amount collected by you, less 2½ per cent. commission, which I have done.

Yours truly, (Signed) WM. NORRIS.

EXHIBIT No. 15.

FEB'Y 15, 1875.

Ben Holliday:

Otis telegraphs me I made arrangements for his salary at
73 $6,000 per annum, steamship company to pay portion. I have no recollection of any such arrangements; I had no authority to make it, and can take no further responsibility in the matter; will you so inform him? W. N.

EXHIBIT No. 16.

SAN FRANCISCO, *Feb'y* 15, 1875.

Dear Otis:

I was quite surprised to receive your telegraphic reference to the salary, and immediately forwarded you the following: "I have no recollection of making any arrangement about salary. I had no authority from steamship company or Holladay to do so, and I do not know what the salary is for. If there is any such understanding on your part you must at once talk with Holladay, as I can take no responsibility in the matter." Since your telegram was received I have a faint recollection that the last time I was in New York, on my return from Europe, at the time I was so very sick, you spoke to me as to my opinion of what your services were worth to Mr. Holladay, but I cannot conceive it possible that I should have made any definite arrangement; for, in the first place, Mr. Holladay was there, to whom you could have talked; and at the time I had no idea that I should engage in any business matters on my return to San Francisco. At any rate, if from what was said you have an idea that you were entitled to any salary, I must now, on the part of the steamship company, and also on the part of Mr. Holladay, decline to assume any further responsibility in the matter, and your position must revert to the time before any conversation was had on the matter.

As I wrote you yesterday, Mr. Latham positively de-
74 clines to allow more than the 2½ commission for collecting the mail pay, and you must yourself arrange with Mr. Holladay for compensation for your services in his interest. Regretting any misunderstanding in the matter,

Yours truly, (Signed) WM. NORRIS.

EXHIBIT No. 17.

(Received at San Francisco, Feb'y 17, 1875.)

NEW YORK, *Feb'y* 16, 1875.

To Wm. Norris, agt.:

Your telegram of fifteenth and sixteenth received. Your draft at one day's sight will not be paid. Will pay only for amount as indicated in my dispatch.

GEO. K. OTIS.

EXHIBIT No. 18.

(Received at San Francisco, Feb'y 19, 1875.)

WASHINGTON, D. C., *Feb'y* 29, 1875.

To W. Norris:

In accordance with your telegram of February seventeenth I will pay the draft. The money due me I need badly. Will you remit it to me?

GEORGE K. OTIS.

EXHIBIT No. 19.

FEB'Y 23, 1875.

Geo. K. Otis, 35 William street, New York:

I have remitted by mail fourteen hundred dollars under instructions.

The Oregon Steamship Company will allow two and one-
75 half (2½) per cent. for collecting mail pay, and no salary will be allowed. I am no further responsible for any salary.

(S'g'd) WM. NORRIS.

EXHIBIT No. 20.

SAN FRANCISCO, *Feb'y* 25, 1875.

Geo. K. Otis, Esq.

DEAR OTIS: I enclose d'ft for fourteen hundred dollars, which is the amount claimed for salary to the 1st Feb'y. Referring to my former letters and telegrams you will notice that Mr Latham declines to allow any salary account of the Oregon Steamship Co., and that the compensation of 2½ per cent. for collection of mail pay must be considered in full for all services rendered.

In reference to your services for Mr. Holladay, as he is now in Washington, you must, as I have before written, make your arrangement with him. I trust the commission for collecting will be

considered satisfactory; if not, please inform me at the earliest moment after the receipt of this letter by telegraph.

Very truly yours,

(Signed) WM. NORRIS.

EXHIBIT No. 21.

(Received at San Francisco, May 5th, 1875.)

NEW YORK, *May 5th*, 1875.

W. Norris, agent:

You can draw on me at sight for eleven thousand nine hundred and seventy dollars ($11,970), mail pay, quarter ending March. Department deducted for five round trips not made between San Francisco and Portland. I write you full.

GEORGE K. OTIS.

76 EXHIBIT No. 22.

NEW YORK, *May* 24, 1875.

W. Norris, Esq., agent, San Francisco.

DEAR SIR: Have just returned from Washington, finishing up mail matters, and find your telegram of 21st. On May 5th I advised you by telegraph to *value* on me at sight for $11,970, currency, mail pay, quarter ending 31st March, less deductions, &c., for failures, on route from Portland to San Francisco. I expected to get official papers from Department showing deductions, in a day or two, but owing to the new system of "red tape" it did not reach me until to-day. I now enclose you same, which shows:

Failure in December, 1 trip.
" at San Francisco in February, 2½; 1 trip.
" at San Francisco in January, ½.
" " in March, ½.
" at Portland in January, 3½; 1½.
" " in January, ½.

In all five trips, which, at $520.82 each, makes deduction $2,604.10, we thus stand:

Mail pay, Portland to San Francisco, qr. ending 31st March, 1875		$6,250
Mail pay, Portland to Sitka, ending 31st March, 1875		8,700
		$14,950
Deduction	$2,604 10	
May 15, paid your draft	11,970	
May 15. 2½ com. on $14,950	373 75	
		14,947 85
Two $\frac{1.5}{1.0.0}$ dollars to your credit		$2 15

You remember I telegraphed you in case the trip was not run deductions would be made by the Department in all cases,
77 and there is no way of getting around it. I enclose you copy of the decision of the Department, in the matter of the deduc-

tion of $2,900 from the Sitka pay, for quarter ending 31st December, 1874, by which you will see that amount is also lost.

Yours truly,

GEO. K. OTIS.

EXHIBIT No. 23.

(Received at San Francisco, July 26th, 1875.)

NEW YORK, *July 26th*, 1875.

To Wm. Norris, agent:

You can draw on me at sight for thirteen thousand seven hundred and one twenty-five one-hundredth dollars. This is for mail pay for quarter ending June 30th, less two and one-half per cent. for collection, and my charge for use of contract at one hundred and seventy-five dollars per month, from February first to July first, eighteen seventy-five.

GEO. K. OTIS.

EXHIBIT No. 24.

(Received at San Francisco, July 28, 1875.)

WASHINGTON, D. C., *July* 28, 1875.

To W. Norris:

Otis, as you know, is no agent or employee of mine. I made no arrangement with him for collecting my pay; did not know anything about it until you telegraphed me last spring. Why should my negotiations be broken off for acts of a man I have no control over? Mr. Latham must do me the justice to state above facts in his proposed telegram. I mail your message to Otis. Does he charge commission in addition to salary? How much?

BEN. HOLLADAY.

78 EXHIBIT No. 25.

JULY 30TH, 1875.

Geo. K. Otis, 35 Broadway, N. Y.:

Referring to my letters of February fifth and twenty-fifth, and your telegraphic reply of March ninth accepting two and a half per cent. as full compensation for services on mail contract, I am directed by Latham to draw on this date for fourteen thousand five hundred and seventy-six dollars for last quarter mail pay, which I have done.

(Signed) WM. NORRIS.

EXHIBIT No. 26.

(Received at San Francisco, July 31, 1875.)

NEW YORK, *July* 31, 1875.

To W. Norris:

Yours of the thirtieth received. As I did not and do not accept two and one-half per cent. as full compensation, I have to say your

draft on me for fourteen thousand five hundred and seventy-six dollars will not be honored; will only pay as indicated in my telegram of twenty-sixth inst.

GEO. K. OTIS.

EXHIBIT No. 27.

AUG. 3, 1875.

Geo. K. Otis, 35 William St., N. Y.:

Latham has instructed me to draw on you for mail pay last quarter, as indicated in your dispatch, thirteen thousand seven hundred and one dollars. He also, on part of the Oregon Steamship Company and its creditors, protests against you withholding the amount of eight hundred and seventy-five dollars as not being authorized to do so.

(Signed) WM. NORRIS.

79 EXHIBIT No. 28.

(Received at San Francisco, Oct. 27, 1875.)

NEW YORK, *Oct.* 27, 1875.

To W. Norris:

Mail pay not yet collected; will notify you when to draw.

GEO. K. OTIS.

EXHIBIT No. 29.

(Received at San Francisco Nov. 16, 1875.)

NEW YORK, *Nov.* 15, 1875.

To W. Norris, ag't:

You can *value* on me at sight for fourteen thousand and fifty-one dollars and twenty-five cents ($14,051.25), mail pay, quarter ending thirtieth September.

GEO. K. OTIS.

EXHIBIT No. 30.

(Received at San Francisco Aug. 4, 1874.)

NEW YORK, *Aug.* 4, 1874.

To W. Norris:

You can draw on me at sight for six thousand and eighty-seven dollars and fifty cents, mail pay on route San Francisco to Portland, quarter ending June 30th, less two and a half commission; will collect Sitka; will pay when certificate arrives.

GEO. K. OTIS.

EXHIBIT No. 31.

(Received at San Francisco Oct. 29, 1874.)

NEW YORK, *Oct.* 29, 1874.

To W. Norris:

You can draw on me at sight for six thousand and ninety-four dollars, mail pay, San Francisco to Portland, for quarter ending Sept. thirtieth.

GEO. K. OTIS.

80 At the time of the offer by the plaintiff to read said foregoing exhibits the plaintiff's counsel duly called upon the defendant's counsel to produce the originals of the telegrams or press copies, or any other copies that the defendant might have of such telegrams as were sent by the defendant, and also to produce such of said telegrams and letters as were received by the defendant, and plaintiff's counsel then offered proof of service of notice to produce each of such papers above named; the defendant's counsel thereupon duly waived proof of service of such notice; the defendant's counsel did not produce the papers aforesaid or any of them, stating that he had searched for them and was unable to find them or any of them.

The defendant's counsel duly objected to the introduction of each and every of the foregoing telegrams and letters numbered 3, 4, 11, 12, 14, 16, 17, 18, 19, 20, 23, 25, 26, 27, purporting to be addressed to the defendant, on the ground that there was no competent evidence that he ever received the originals, and to the introduction of each and every of those purporting to have been signed by him, upon the ground that there was no competent evidence that he ever wrote or sent them. Such objections were severally overruled by the referee, and the defendant's counsel severally duly excepted to each of such rulings.

Plaintiff's counsel read in evidence the deposition of Samuel Osgood Putnam, taken at San Francisco by commission, as follows:

My age is 61 years; my occupation, book-keeper and cashier of the Oregon Steamship Company; my residence, San Francisco.

81 I am acquainted with the officers and business affairs of the plaintiff; the defendant I do not know personally.

When the plaintiff corporation was organized in August, 1872, I was appointed book-keeper and cashier, and have held that position continuously up to the present time, and during the absence of Mr. Norris in Europe, for about six months, I was the acting agent of the company in San Francisco.

I have charge of the books and funds of the company in their office at San Francisco, and I have considerable to do with the correspondence of the company.

The plaintiff, among other things, has been engaged in carrying the U. S. mails between San Francisco and Portland, also between Portland and Sitka, during the whole time since the organization of the company; the Sitka mails only up to September, 1876; these mails have been carried by the company during most of this time,

not under contracts directly between the P. O. Dep't and the plaintiff, but under contracts between the P. O. Dep't and George K. Otis, the defendant.

The plaintiff carried the U. S. mails between San Francisco and Portland, Oregon, from the time of its organization up to July 1, 1874, and I have already explained all I know of the contract under which service was performed.

For this mail service up to July 1, 1874, the plaintiff was paid according to the arrangement between the plaintiff and defendant.

At the time of the formation of the Oregon Steamship Company such predecessor of the plaintiff assigned and transferred to the plaintiff its rights and privileges under said contract; such arrangement was made in August, 1872.

For such service prior to July 1, 1874, the plaintiff received compensation for such service at the rate of twenty-five thousand dollars per annum, paid quarterly, less a commission of two and one-half per cent. allowed by the plaintiff to the defendant for collecting such pay.

82 The Oregon Steamship Co. was organized about August 1st, 1872, and for the first two months of its existence—that is, August and September, 1872—it received pay for the mail service from the North Pacific Transportation Co., its predecessor, in full, without deduction of any commission to the defendant for collection.

After the first of October, 1872, the defendant was allowed a commission of two and one-half per cent. for collecting the mail pay for the remaining time of that contract; that is, up to July 1st, 1874.

The plaintiff carried the U. S. mails between San Francisco and Portland continuously from July 1, 1874, to June 30, 1878.

Previous to the making of this contract the defendant had been in the employ of the plaintiff only for the purpose of collecting the mail pay quarterly at Washington, except that in one instance he purchased some material for the use of the plaintiff.

Q. Did the plaintiff ever have or enter into any agreement or contract with the defendant for the performance of the mail service above referred to? If yea, what was such agreement? If in writing, annex the same to your deposition or a copy thereof, stating why you do not annex the original.

A. No such contract, either verbal or in writing, was ever made, so far as I know. The plaintiff received the contract price for such mail service up to March 31, 1878, excepting certain amounts claimed as compensation and withheld by the defendant. For the quarter ending June, 1878, no pay whatever for such service was received by the plaintiff, the entire amount due the plaintiff being retained by the defendant.

The payments for such services were made quarterly by the United States Government to the defendant directly.

The defendant resided in New York city, and when he had collected the mail pay he would telegraph the plaintiff or its officers

at San Francisco to draw upon him for special sums, and
83 drafts upon him would accordingly be made. For the quarter ending December 31, 1876, and subsequently the money was paid by the defendant to Mr. Villard, president of the plaintiff, in New York. During all the period last mentioned I kept the books of account for the plaintiff and they are in my handwriting. These books contain a separate account of the transactions of the plaintiff respecting the mail service last described. These books were kept by double entry and the accounts of all transactions relating to said mail service were entered up under the heading "Mail contract" and "Post Office Department." The entries were made at the time of the several transactions; no other books were used, nor was any statement of account ever received by the plaintiff from the defendant or other person or persons relating to the mail contract.

The defendant claimed as compensation for his services and actually retained the amount of $9,706.25. He has also retained the entire amount collected for the quarter ending June 30th, 1878.

I know of no other compensation received by defendant by way of salary or otherwise.

I know that there was considerable correspondence on the subject of the defendant's compensation between defendant and plaintiff, through Mr. Norris, the San Francisco agent, but all letters or telegrams or copies thereof which related to that correspondence, and which were in my custody, I have turned over to Mr. Norris to be introduced into his deposition. No part of the pay for said mail service has been received by the plaintiff for the quarter ending June 30, 1878.

Cross-examination:

I know that such mail service was peformed, because I was an officer of the plaintiff, and was familiar with all the circumstances connected therewith, and the pay for such service came to me personally.

84 Such service was done under a written contract, but I do not think that such written contract was in the name of the plaintiff.

I know the plaintiff received pay for such service, and that I, as cashier of the plaintiff, received the money partly from the North Pacific Transportation Company and partly from George K. Otis, the defendant.

HENRY VILLARD, sworn for plaintiff, testified as follows:

Direct examination:

Q. What connection have you sustained to the Oregon S. S. Co.?

A. I was president of it from April, 1876, to within the last year. I know the defendant and have known him since 1874.

Q. Did you have any transactions with the defendant respecting the mail pay?

A. I did; as president of the steamship company those trans-

actions took place at various times during my administration, generally in New York, this city.

Q. Have you ever had any personal interviews with the defendant respecting this mail pay?

A. Certainly; a number of them.

Q. State when the first interview took place that you remember, and what happened at that interview?

A. The first interview took place in the summer of 1876, the month of May or June, in the city of New York; it was on the street. I called Mr. Otis' attention to the fact that I had assumed the presidency of the company; that I had been officially advised by my subordinates in San Francisco that he was retaining more than his former compensation out of the mail moneys received for
85 services performed by the company on the San Francisco and Portland route. I objected at the time to the detention of the larger amount.

Q. Do you remember anything the defendant said at that time?

A. Yes; he said he was contractor, and he was entitled to retain the amount for his services. That was all that took place at that interview so far as my recollection goes. There were repeated meetings between us in reference to the payment to the company of the moneys due to it. There was more or less delay always in the payment. Subsequent interviews, until the final payment last spring, related mainly to the delay in the payment of money due to the company; that is, I remonstrated with him for the delay.

Q. Did that remonstrance go to the point of the defendant's retaining, as you said, a large amount?

A. I referred to it immediately, protested and remonstrated, knowing that he collected the money; we could not go beyond that at the time.

Q. What was the last interview which you had with the defendant respecting the mail pay?

A. The last interview took place some time in the summer of 1878 at the stable of Mr. Otis. I called his attention to the fact that a demand had been made of him repeatedly for the last quarter's mail money. I called his attention to the repeated demands that had been made upon him for the last quarter's mail money. I wished to know of him why he had not paid the money as he had done every quarter during the whole of my administration as president; he had paid a certain amount every quarter regularly, sooner or later, excepting the last quarter; I asked why that last quarter had not been settled for with the company; he said he had decided to keep it all for himself; and upon my remonstrating with him he remarked, "Well, I will tell you what I will do; I will reverse the former proportion; instead of giving you 90 per cent. and
86 keeping 10 per cent., I will keep 90 per cent. and give you 10 per cent." That was the conversation, and I then left the stable.

Q. As a matter of fact, has that last quarter, or any part of it, ever been paid by the defendant to the company?

A. No, sir.

Q. Did you at any time have a conversation with Mr. Ben. Holladay respecting the defendant's connection with this mail contract?

A. I did; I do not remember more than one occasion—that was in the early months of 1876.

Q. At that time were you or was Mr. Ben Holladay the president of the plaintiff company?

A. Mr. Holladay was then president of the company at the time I had this conversation.

Q. Will you state that conversation?

Objected to; excluded. Plaintiff excepted.

Plaintiff rests.

GEORGE K. OTIS, defendant, sworn and examined on his own behalf, testified as follows:

I am the defendant in this action. I was not in the spring of 1874, nor have I at any time been, in the employ of the plaintiff, nor of the Northern Pacific Transportation Company. I knew David P. Thompson, of Portland, Oregon, in the spring of 1874, and had a conversation with him in the city of Washington at that time with respect to bidding upon contracts for the carrying of the mails between Portland and San Francisco. He said he was not going to bid, and now was my opportunity.

Q. Did you ask him to make the necessary deposit of five per cent. on the bid?

A. No, sir.

Q. Who furnished the money to make that deposit?

A. I did.

87 By the REFEREE: Q. Did you get it from Holladay?

A. No, sir.

Q. Did you get it from Thompson?

A. No, sir. I afterwards charged against the contract and received interest on that deposit. There was nothing said about my inability to go on Thompson's bond, nor its making any difference whether he or I bid for the contract.

Q. Was there any understanding between you and him that he in his individual or representative capacity was to have any interest in the contract?

A. Not at all, sir.

Q. Or anybody else?

Objected to. Objection sustained. Defendant's counsel excepted.

Q. Had you any prior contract with the Post Office Department in your name for that route?

A. No, sir.

Q. Was there any arrangement between you and the plaintiff as to the payment for your services in connection with mail contracts prior to July 1st, 1874?

A. None.

Q. Was there any arrangement as to payment the plaintiff was to receive?

A. None.

Q. Was there ever any agreement between you and the Oregon Steamship Company as to the division of the proceeds of mail pay under the contract in question?

A. There was not.

Cross-examination:

When I say I charged the interest against the contract, I mean I deducted from the mail pay the interest on my money that I put up to get the contract.

88 Q. Deducted from what mail pay?

A. The mail pay on my route.

Q. How did you deduct it?

A. Took it out.

Q. From whom was it deducted; who had the loss; who had the deduction charged against them?

Objected to. Allowed. Defendant excepts.

A. I don't know who had the loss. I remitted that much less money; whether to Holladay or Norris I don't remember now; to whomever it was remitted it was for the Oregon Steamship Company; they were carrying the mails, and I presumed it was for them. At the time of the bid I put up five per cent. on the $25,000, or whatever it was, given by certified check. My memory of it now is that it was either my or Samuel L. M. Barlow's check; the check was returned to me from the Department. If my check, I deposited it in the Bank of the State of New York; if Mr. Barlow's, I returned it to him. I don't now remember which is the fact.

Q. Did you notify the company that you had deducted that much on that account?

A. Yes, sir.

Q. At the time you made the deduction?

A. Yes, sir; not the company. I notified Mr. Holladay or Mr. Norris, whichever it was. At the time the transactions I have testified to were had with Thompson, at Washington, Mr. Holladay was not there, though his name was mentioned. He was not in Washington, nor do I think he was East at all that spring; if he had been I should have remembered it. He was not there between the times the bid was made and the contract awarded; my impression is I did not see him until the fall of that year.

Prior to the year 1874 Ben. Holladay had the contract in question on the route between San Francisco and Portland. When I

89 say I furnished the money to make the deposit I mean I had either my certified check or that of Mr. Barlow. In either case it was not indorsed by me, but drawn to the order of the Postmaster General. I knew Mr. Barlow well. He is now my counsel in some matters. I think Mr. Barlow was Mr. Holladay's counsel at that time. I don't know whether Mr. Barlow or his firm were counsel for the Oregon Steamship Co. at that or any time or not.

Redirect examination:

No conversation passed between Mr. Holladay and myself with reference to bidding upon the contract in question before the bid was made.

The defendant's counsel then read in evidence letters and telegrams annexed to said deposition of William Norris, and numbered exhibits as follows:

EXHIBIT 32.

SAN FRANCISCO, *Feb'y* 25, 1875.

DEAR BEN: Your letter, 16th inst., just at hand. In reference to Otis' salary you are right; that when the N. P. T. Co. were doing a large business an arrangement was made with him by which his salary was divided between that company and the land company and yourself. When the N. P. T. Co. was sold out, and the land company declined to pay any salary, you told me you had cut off Otis' salary; at any rate I know that Otis did not think he was receiving anything. However, to make the matter short, Latham positively refuses to allow more than 2½ per cent., and if Otis don't choose to do the collection of mail pay for this amount we must get some one else to collect. As for the danger of making Otis an enemy, simply because we don't choose to pay what he himself asks, if that is to be the case we had better stop business of all kinds at once, but I can't think Otis is just such a man. I think better of him than to believe he would turn against you or against any interest you may have simply because he could not get what salary he might ask for. As for compensation for services done for yourself, you must make your own arrangement with him.

Truly your friend, WM. NORRIS.

EXHIBIT No. 33.

JULY 27TH, 1875.

Ben. Holladay, Washington, D. C.:

Otis charges one hundred and seventy-five per month, also commission two and a half. Latham and myself wrote him last quarter positively that it would not be allowed. Answer in whose name does mail contract stand.

(Signed) WM. NORRIS.

EXHIBIT No. 34.

JULY 27, 1875.

Ben. Holladay, Washington, D. C.:

Latham says that we both notified Otis when he last demanded, and I consented to pay against his protest the exaction of one hundred and seventy-five dollars per month, that it was there to end. Otis now again exacts same sum. Latham says, under instructions, he will be compelled to telegraph it to London, which will be fatal to your negotiations.

(Signed) WM. NORRIS.

EXHIBIT No. 35.

JULY 27, 1875.

Ben. Holladay, Washington, D. C.:

91 Latham desires me to telegraph you that, under his instructions from London, if Otis persists in exacting, as he does, one hundred and seventy-five dollars per month, besides his commission, he must immediately give notice to terminate charter California, and let London people know facts, which he fears will be fatal to pending negotiations.

(Signed) WM NORRIS.

EXHIBIT No. 36.

JULY 27, 1875.

Ben. Holladay, Washington, D. C.:

In whose name were mail contracts taken to Portland and to Sitka? Answer.

(Signed) WM. NORRIS.

EXHIBIT No. 37.

OCT. 14TH, 1875.

Ben. Holladay, Portland, Oregon:

Did you make any arrangement in reference to Otis' salary for collecting mail pay, or does he still expect it?

(Signed) WM. NORRIS.

EXHIBIT No. 38*a*.

JULY 28TH, 1875.

Ben. Holladay, Washington, D. C.:

On twenty-fifth February I wrote Otis that nothing but his commission would be allowed. He replied by telegraph acceptance of terms. After six months he now makes claim. Latham will do you full justice in telegraphing, if he finds it necessary

92 to telegraph at all. Answer in whose name contracts stand.

(Signed) WM. NORRIS.

Defendant thereupon rested, and the plaintiff's counsel read in evidence telegrams annexed to said deposition of William Norris, marked Exhibits —, as follows:

EXHIBIT 39.

SAN FRANCISCO, *Feb'y* 13, 1875.

DEAR BEN: I received a telegram from Otis saying to draw on him for mail pay, less his salary, for the last eight months, at $175 per month. You know all disbursements of Oregon Steamship Company go through Latham's inspection. He says he does not see what Otis does to authorize him to receive any salary from the steamship company, and he thinks his charge for collections, 2½ per cent., amounting in all to $1,500 a year, is sufficient compensation for his attending to the mail business. At any rate he tells me that under no circumstances will he allow this salary, and directs me at

once to draw on Otis for the full amount of mail pay collected by him, less the commission of 2½ per cent. I telegraphed you about the matter this morning, and I shall draw on Otis for the full amount.

Yours truly, WM. NORRIS.

EXHIBIT 40.

(Received at San Francisco, March 20, 1876.)

WASHINGTON, D. C., *March* 20, 1876.

To Wm. Norris:

Draw at sight on Otis, New York, for ten thousand eight hundred and ninety dollars and eighty-four cents ($10,890.84), mail pay, for quarter ending Dec. 31, on routes Port-
93 land to Sitka and San Francisco to Portland, which is full amount, less deductions one trip on Sitka route, not made, of twenty-nine hundred, and one-half of a trip on San Francisco route of two hundred and sixty dollars and forty-one cents, and Otis' commission, eight hundred and ninety-eight dollars and seventy-five cents.

BEN. HOLLADAY.

The plaintiff thereupon rested, and the defendant requested the referee to find as matters of fact and law as follows:

First. The defendant made the contract mentioned in the complaint in his own name and behalf with the Government of the United States, and assumed all the risks and responsibilities in the execution of the said contract on his part imposed by its terms and the laws of the United States regulating the mail service applicable to the said contract.

The referee refused to so find. Defendant's counsel excepted.

Second. The plaintiff was at no time under any obligation to continue the service of carrying the mails under the contract in question, and incurred no risks, and assumed no liability either to the United States Government or to the defendant to perform said service.

The referee refused to so find. Defendant's counsel excepted.

Third. The defendant made some effort to effectuate an agreement with the plaintiff in respect to the terms of such service as between him and the plaintiff, but none was ever consummated.

The referee refused to so find. Defendant's counsel excepted.

94 And as matter of law defendant requested referee to find—

That the plaintiff is not entitled to recover in this action, and that the complaint should be dismissed upon the merits, with costs.

The referee refused to so hold. Defendant's counsel excepted.

Opinion.

N. Y. Supreme Court.

THE OREGON STEAMSHIP COMPANY *against* GEORGE K. OTIS.

George H. Adams, Esq., for plaintiff; John Sessions, Esq., for defendant; J. S. Bosworth, referee.

In March, 1874, the defendant obtained from the United States Government a contract for carrying the mails between San Francisco and Portland, Oregon, for four years from June 30, 1874, at $25,000 per year. The plaintiff performed the mail service required by that contract, and the defendant has received from the U. S. Government the agreed compensation. The defendant has paid to the plaintiff $13,456.25 less than he collected, besides retaining a commission of 2½ per cent. on $100,000. The plaintiff seeks to recover that sum on the ground that, as matter of fact as between the parties to this action, that contract was obtained by the defendant as the agent of and for the benefit of the plaintiff, and that the defendant was to be compensated for his services in obtaining the contract and in collecting from the Government and paying over to the plaintiff the moneys thus collected by being paid a commission of 2½ per cent. on the amount collected.

95

The important question is whether such was the fact. There is no direct evidence of the employment of Otis by the plaintiff to procure this contract for its benefit. Neither is there any direct evidence of the making of an agreement between the plaintiff and the defendant by which the plaintiff agreed to perform for the defendant the mail service required by this contract either for an agreed rate or amount of compensation or for such sum as the service might be reasonably worth. The contract between the parties, or their position to each other in respect to this matter, must be determined from their acts and correspondence in respect to the subject-matter.

The defendant, in the contract with the U. S. Government, is the contractor, and on the face of contract it is his contract. But though he was, as between him and the U. S. Government, the principal, yet it was lawful for him to make such a contract, and yet as between him and the plaintiff to make the contract for its benefit and on its behalf solely.

It is important to a correct interpretation of the acts of the parties in respect to the making and execution of this contract to consider the relation in which they stood to each other before and at the time this contract was made. Prior to the incorporation of the plaintiff the North Pacific Transportation Co. had been carrying the mails on their steamships from San Francisco to Portland, Oregon, and from Portland to Sitka, and was thus carrying them when the plaintiff was organized. Thereafter the plaintiff had the benefit of the then existing contracts, and performed the mail service required by them. The defendant collected from the U. S. Government the mail pay and paid it to the plaintiff, less 2½ per cent. commission as his com-

pensation for collecting it. David P. Thompson, a personal
96 friend of Ben. Holladay, the plaintiff's president, was in Washington at the time bids were being made for this contract. He was requested by Ben. Holladay, the plaintiff's president, to bid for this contract, and to make the necessary deposit of five per cent. on his bid. According to his testimony it was arranged that Otis should bid, and that he should be one of Otis' sureties, as Otis could not become one of his sureties. Otis made a bid, which was accepted.

Otis signed the contract as principal, April 8, 1874. Ben. Holladay signed it as surety, April 9, 1874, and David P. Thompson signed it also as surety, April 9, 1874. The sureties were approved June 2, 1874. In May, 1874, William Norris, the plaintiff's agent, was in this city about a fortnight. He had just returned from Europe and was in feeble health, and had some conversation with Mr. Otis. This, it will be remembered, was but a few weeks before the commencement of the service, under the contract in question. Any then existing contract for carrying the mails between those points would soon terminate.

It would seem from the evidence that there was an existing contract which had some time to run for carrying the mails between Portland and Sitka; that the plaintiff carried the mails under such contract, and that both prior and subsequent to June 30, 1874, the defendant collected the mail pay and paid it to the plaintiff, less 2½ per cent. as his commission for thus collecting and paying over.

Norris testifies of that conversation thus: "The only conversation I had with the defendant with reference to this compensation was on the cars at the railroad station, on the evening that I left for San Francisco, which evening was early in June, 1874; Mr. Otis, the defendant, spoke to me of his services in attending to mail matters for the company at Washington and to any other matters of business which the company might have in the East. He also spoke of
his services in attending to private business for Mr. Holliday.
97 I think he mentioned a round sum for all these services, of which he thought the steamship company ought to pay $175 a month. I fully agreed with him that his services were valuable, and that he was entitled to full compensation for them. I do not recollect making any specific arrangement with him; am confident that I did not; but I remarked that I would talk with Mr. Holliday about the matter, and doubtless some satisfactory arrangement would be made. I don't think I mentioned the matter to Mr. Holliday at the time."

Holliday was on the cars at this time and left New York on the same train with Norris. There is no pretence that Otis then talked with Holliday, the plaintiff's president, on this subject.

The significant feature of this conversation is that Otis expressed in it his views as to the compensation he should have for his services.

In it all there is nothing about the sum he was to pay or allow to the plaintiff for performing the mail service.

There is nothing in the conversation suggesting the idea that the plaintiff, in carrying the mails, was doing or would be doing it for him. On the contrary, the conversation is considered only with the

idea that the plaintiff, in performing the mail service, would be performing a contract which, as between it and Otis, was its contract, and one which it was under obligation to perform.

The defendant's object and desire manifestly were to make some arrangement by which, in addition to his commissions, for services in obtaining the contract and collecting and paying over the mail money, he should be paid an agreed salary for performing the service of which he spoke to Norris. And some of these services were to be rendered "in attending to private business for Mr. Holladay."

The matter of his commissions would seem to have been regarded by him as a matter perfectly well understood. No special mention is made of them.

98 Looking at this conversation, in the light cast upon it by the relations then existing between these parties, it is consistent with the fact that he had acted as the agent of the plaintiff in obtaining this contract.

On the theory that the contract was his own and that he desired the plaintiff to perform the service required by it for some reasonable or agreed compensation, it was irrational if not absurd.

Mr. Otis testifies that Thompson told him at Washington, prior to his bidding for the contract, that he, Thompson, should not bid for it, and said to him, "Now is your opportunity." This would indicate that Otis expressed that Thompson would or might be a bidder. This testimony is considered with the theory that he would or might bid and take the contract for the benefit of the plaintiff, or that he should bid and take it to the exclusion of any interest of the plaintiff in it.

On the former theory he would secure his right to the usual commissions theretofore paid to him, and the plaintiff, as between him and it, would be bound to perform the same; on the latter theory the plaintiff would have no interest in or anything to do with it unless the defendant should thereafter employ the plaintiff to perform the services which the contract required him to render; there is no evidence of there having been any conversation between the defendant and any officer of the plaintiff at or about that time looking to or hinting at any arrangement for the performance of this service for the defendant and as his employé.

Oct. 10, 1874, Otis telegraphed to Norris thus:

"Can't collect mail pay until certificates from both ends of Departments are received by Department."

I assume that this refers to the quarter ending September 30, 1874.

October 29, 1874, Otis telegraphed to Norris thus:

"You can draw on me at sight for six thousand and ninety-four dollars, mail pay, San Francisco to Portland, for quarter ending September 30."

99 This amount is a full quarter's pay at contract price, less 2½ per cent. commission. This act of Otis imports that according to Otis' understanding the plaintiff was entitled to that amount as part of this quarter's pay. But this telegram, it is to be

observed, is silent as to any commissions having been deducted or why authority was given to draw for the precise sum named.

The telegram of February 3d, 1875, which was sent from Washington, where, of course, Otis then was, and who had received the mail pay for the quarter ending December 31, 1874 (or January 1, 1875), was directed to Norris at San Francisco, and reads thus:

"You can draw on me at sight in currency at New York for fifty-nine hundred and fifty-three dollars, mail pay, San Francisco to Portland, quarter ending January first; have deducted two and one-half per cent. and one hundred and thirty-one dollars, interest on certified checks put up when I bid."

In this connection it is proper to state that on the 11th of August, 1874, Otis, at Washington, had telegraphed to Norris thus:

"Your postmaster has not reported to Department service on route to Portland for July. Until this is done I cannot get checks deposited on my bid. Please have this attended to."

This telegram of February 3d, 1875, gives rise to several suggestions.

First. It suggests the idea that the plaintiff was entitled to the "mail pay" less some agreed or just deduction. By "mail pay" the defendant evidently means the sum received from the Government for the quarter ending January 1, 1875.

Second. That he has "deducted two and a half per cent." For what he made that deduction or why he deducted that precise "per cent." no explanation is given. The fact is stated as if the reason for making that deduction and the amount of it was a matter
100 well understood. But it is "a deduction" which he claims the right to make and does make from a sum the whole of which is treated as if it belonged to the plaintiff, subject to the right to deduct that much from the sum he had received.

Third. It informs Norris, as the plaintiff's agent, that he has also deducted "one hundred and thirty-one dollars, interest on certified checks put up when I bid."

This deduction he explains. In substance, he informs the plaintiff that the interest on $5,000 deposit which he made, while it continued, was $131, and as he was subjected to this loss in procuring this contract for the plaintiff it should be borne by it. If this were not so, why say anything about this deduction? If the plaintiff, in carrying the mails under this contract, was acting as the employee of the defendant, and the defendant was to pay the plaintiff an agreed or a reasonable compensation to be thereafter determined, why allude to it at all, or to the fact of having deducted, besides that, $2\frac{1}{2}$ per cent.?

Why did he not telegraph simply that you can draw on me for $5,953, on account of your services in carrying the mail?

On the contrary, the terms of this telegram import that the plaintiff might justly, and as a matter of right, draw for that sum "for mail pay" for the quarter ending January 1, 1875, and that such a draft and the payment of it would liquidate and clear the accounts in respect to the matters to January 1, 1875. And it also assumes

that for the quarter ending September 30, 1874, there had been a full and absolute adjustment according to the understanding then existing between them.

This telegram of February 3, 1875, was sent some ten months after Otis and sureties had signed the contract and some seven months after the carrying of the mails under the contract in question had commenced, and after six months of service under the con-
101 tract had been performed and paid by the U. S. Government.

All that had taken place up to that date indicates that it was well understood between Otis and the plaintiff that the mail pay was to be divided between them in the proportion of 97½ per cent. to the plaintiff and 2½ per cent. to the defendant.

The defendant, as matter of fact, on receiving the mail pay divided it in those proportions and authorized the plaintiff to draw for the 97½ per cent. This must have been done by Otis for one of two reasons:

Either he considered the contract as one made for the benefit of the plaintiff, and that his compensation for making it and collecting the mail pay and paying it to the plaintiff was to be a commission of 2½ per cent., or that the plaintiff was to have the benefit of his contract and was to perform the services required by it, and was to receive therefor 97½ per cent. of the mail pay.

Assuming that the mail pay was to be divided in such proportions, it made no practical difference to the parties whether, as between them, the contract was to be deemed to be one obtained for the benefit of the plaintiff or for the benefit of Otis.

Yet there is nothing in all that is shown to have taken place between Otis and the plaintiff up to that date which indicates that the plaintiff, in executing this contract, was acting as the employee of Otis.

Otis testified on this reference that he was not at any time in the employ of the plaintiff, or of the Northern Pacific Transportation Company; what he means by this it is difficult to perceive, for it is clear that up to June 30, 1874, he collected for the plaintiff the mail pay on the then existing contract from San Francisco to Portland, and prior and subsequent thereto on the contract for carrying the mails between Portland and Sitka, and received therefor 2½ per cent. commissions. He also testifies that there was no arrangement between him and the plaintiff as to payment for his services
102 in connection with the mail contracts prior to July 1, 1874; nor as "to the payment the plaintiff was to receive;" nor as "to the division of the proceeds of the mail pay under the contract in question." Notwithstanding this testimony the evidence indicates strongly that Otis considered and understood that 2½ per cent. commission was and was to be full compensation for collecting and paying over the mail pay. But independent of that, and outside of that, he desired to obtain an agreement from the plaintiff to allow him $175 per month as a "salary" for performing services, the particulars or nature of which are not clearly indicated either by testimony of Norris as to the conversation between him and Otis in relation thereto in New York in May, 1874, or by subsequent letters

and telegrams from Otis. The first time, so far as the evidence discloses, that Otis spoke in writing on that subject to any officer of the company was February 12, 1875, in his telegram of that date to Norris. In that telegram he says he has collected $5,800 "Mail pay, Portland to Sitka, quarter ending December 31, * * * the Oregon Steamship Company have not paid me their proportion of my salary from June 1st to February 1st. I have deducted this and two and one-half per cent. collection. You can draw on me at sight; balance, $4,255."

Here is a direct assumption that two and a half per cent. is his compensation for the "collection" of the mail pay. There is also an assertion of a right to a salary from June 1, 1874, to February 1, 1875.

2½ per cent. commission on $5,800 is	$145 00
Balance authorized to be drawn for	4,255 00
	$4,400 00

Deduct this sum from $5,800 would leave $1,400 retained for eight months' salary or at the rate of $175 per month. It will be observed that this claim is made for a "salary" commencing June 1,
103 or one month before the carrying of the mails under the contract in question commenced, and does not appear to have any connection with that contract. It is deducted from mail pay on the contract from Portland to Sitka, and apparently the deduction is made on the theory and assumption that the company owed him $1,400 for salary from June 1, 1874, to February 1, 1875, and having money in his hands belonging to the plaintiff he "deducted this ($1,400) and two and a half per cent. collection."

Immediately on the receipt by Norris of this telegram there were telegrams from Norris to Otis, Norris to Holliday, and Holliday to Norris, which were put in evidence by consent. These telegrams show that Norris and Holliday understood and believed that the contract in question had been obtained for the plaintiff, and that they could not comprehend on what ground Otis made claim to a salary. February 15, 1875, Otis telegraphed to Norris thus: "You will remember that you fixed my salary at six thousand per year, of which the steamship company was to pay me $175 per month. They now owe me this proportion from June 1st."

Otis, in this telegram, apparently refers to the conversation between him and Norris in New York in May, 1874. If Norris did not then agree that the company should pay Otis such a salary it is quite clear that there never was an agreement to pay him such a salary or any salary. Holliday & Norris, in these telegrams to Otis, denied the existence of any such agreement, and refused to recognize the claim. On the 24th of May, 1875, over three months after this episode in their transactions, Otis wrote to Norris, and, after stating what deductions the P. O. Department had made for failure in carrying the mails, and after adverting to some other matters, he states his account thus:

	"Mail pay, Portland to San Francisco, quarter ending 31st March, 1875	$6,250	
104	Mail pay, Portland to Sitka, ending 31st March, 1875	8,700	
		$14,950	
	Deduction	$2,604	10
	May 15, paid your draft	11,970	
	May 15, 2½ com. on 14,950	373	75
		14,947	85

Two $\frac{15}{100}$ dollars to your credit, $2.15."

In this statement, two and a half per cent. on the whole amount received, as well on the one contract as on the other, is charged as a commission for collecting money for and belonging to the plaintiff. Nothing is said in this letter about a salary or anything being due to him on account thereof.

On the 26th of July, 1875, Otis telegraphed to Norris thus:

"You can draw on me at sight for $13,701.25. This is for mail pay for quarter ending June 30, less two and one-half per cent. for collection, and my charge for use of contract at one hundred and seventy-five dollars per month, from Feb. 1st to July 1st, 1875."

This makes an entire change of base, and he seems to acquiesce in the position taken by Norris & Holliday, that there had not been any agreement to pay him a salary. There is nothing in this about his salary. This $13,701.25 is, doubtless, the mail pay on both routes. Otis does not pretend to have had any interest in the contract from Portland to Sitka; and when he speaks of "my charge for use of contract" he evidently refers to the contract in question. The words "use of contract" import that the plaintiff was permitted to use the contract as if it was one belonging to the plaintiff. It is repugnant to the idea that the plaintiff was performing the services required by it as an employee or agent of the defendant. It would seem to mean this: I have permitted you to use this contract as if it had been obtained for you. I will charge you at the rate of $175 per month, besides two and a half per cent. for collecting the mail pay.

105 A careful consideration of all the evidence satisfies me that this contract was obtained by Otis as the agent of, and for the benefit of, the plaintiff. His sureties were Thompson, who was at Washington, and who had been requested by Holladay to bid for the contract before it was awarded, and Holladay, the president of the company. The first two quarters' mail pay were received by Otis and remitted, less 2½ per cent. deducted as his charge for collecting and paying over the money. It must be concluded that up to February 3d, 1875, it was distinctly understood that this mail money was to be, and was, by Otis himself divided in the proportion of 97½ per cent. to the plaintiff and 2½ per cent. to Otis.

There cannot be any escape from the conclusion, as it seems to

me, that this contract was by both parties regarded as one which had been obtained by Otis for the benefit of the plaintiff, and that his compensation was to be 2½ per cent. on the amount collected for his services in procuring the contract and for collecting and paying over the money.

If this was not the understanding between the parties, then the understanding was that the plaintiff was to do what Otis had contracted to do, and was to receive therefor 97½ per cent. of the mail money. All the acts of the parties are repugnant to the latter position, but one in harmony with the position that as between the parties to this action the contract belonged to the plaintiff.

On the pleadings in this action the defendant could not have anything allowed to him for a salary even if the evidence would justify a finding that a salary had been agreed upon. No such counter-claim has been pleaded. Neither is there any allegation that the plaintiff agreed to perform for the defendant the services required by this contract for a reasonable compensation, and that the plaintiff had been paid all that its services were reasonably worth.

106 The single issue in this action is, did the defendant, as the agent of the plaintiff, obtain this contract for the plaintiff, and was it agreed that therefor, and for collecting and remitting the mail pay, he should be paid 2½ per cent. commission.

These facts being found in favor of the plaintiff the plaintiff is entitled to recover the difference between what the defendant has received, less 2½ per cent. on the amount thereof, or the amount the U. S. Government was to pay, and less what he has paid to the plaintiff.

The defendant received from the Post Office Department		$97,131 49
He has paid to pl'ff	$81,175 24	
Def'ts com. on $100,000	2,500 00	
		83,675 24
		$13,456 25
Int. from July 20, 1878, to Jan. 1, 1880, at 7 per cent., and thence to Feb. 20, 1883, at 6 per cent., 4 years, 7 months		3,719 90
		$17,176 15

February 20, 1883.

J. S. BOSWORTH, *Referee.*

107 The defendant's counsel duly excepted to the report of the referee and the findings therein as follows:

The defendant excepts generally to the findings of the referee of fact and law, and to each and every such finding, save only such as were requested by the defendant.

The defendant further specially excepts severally to each and every finding, and to each and every part of each and every such finding designated in his report by the following numbers, namely,

2d (second), 3d (third), 4th (fourth), 5th (fifth), 6th (sixth), 7th (seventh).

The defendant also excepts to the conclusion of law as stated by the referee in his said report and to each and every part thereof.

108 At a general term of the supreme court of the State of New York, held in the first department of the city of New York on the 22d day of May, 1883.

Present: Hon. Noah Davis, P. J.; Hon. John R. Brady, Hon. Charles Daniels, J. J.

THE OREGON STEAMSHIP COMPANY, Plaintiff and Respondent,

vs.

GEORGE K. OTIS, Defendant and Appellant.

The defendant, George K. Otis, having appealed to the general term of this court from the judgment entered upon the report of the referee, Hon. J. S. Bosworth, on the 5th day of March, 1883, in favor of the plaintiff, the Oregon Steamship Company, against said George K. Otis for $18,618.93, and the said appeal having been brought on regularly for argument before the general term of this court on the 22d day of May, 1883, after hearing Mr. William G. Choate for appellant and Mr. George H. Adams for the respondent, and due deliberation being had thereon, now, on motion of Holmes & Adams, attorneys for said respondent, it is ordered that the said judgment entered herein on the 5th day of May, 1883, which adjudged that the plaintiff, the Oregon Steamship Company, recover of the defendant, George K. Otis, the sum of $18,618.93, appealed from as aforesaid, be, and the same is hereby, modified by reducing the
109 same, and the said judgment is hereby reduced by nineteen dollars and forty-seven cents ($19.47), being an overcharge of interest, and that the said judgment, as so modified and reduced, is hereby in all respects affirmed, with costs of the appeal to the respondent, the Oregon Steamship Company, against said George K. Otis.

Take notice that the within is a copy of an order duly entered in the office of the clerk of the city and county of New York.

N. Y., Aug. 27, 1883.

HOLMES & ADAMS,
Att'ys for Pl'ff and Resp'dt, 35 Wall street.

Judgment Dated Aug. 27, 1883.

N. Y. Supreme Court.

CITY AND COUNTY OF NEW YORK:

THE OREGON STEAMSHIP COMPANY *vs.* GEORGE K. OTIS.

The defendant, George K. Otis, having appealed to the general term of this court from the judgment entered herein on the report of the referee, J. S. Bosworth, Esq., on the 5th day of March, 1883, in favor of the plaintiff, the Oregon Steamship Company, and against the defendant, George K. Otis, for $18,618.93, and the

said appeal having been argued before the general term of this court, in the first department, on the 22d day of May,
110 1883, and the said general term, after due deliberation, having rendered their decision modifying said judgment by reducing the same by $19.47, and as so modified affirming the same with costs to the said Oregon Steamship Company, and an order of the said general term having been duly entered herein in accordance with said decision, and the costs of said appeal having been duly taxed at $83.07, now, on motion of Holmes & Adams, attorneys for the said plaintiff, it is adjudged that the said judgment entered herein on the 5th day of March, 1883, in favor of the plaintiff, the Oregon Steamship Company, and adjudging that it recover of said defendant, George K. Otis, the sum of $18,618.93, appealed from as aforesaid, be, and the same is hereby, modified by reducing the same, and the said judgment is hereby reduced by $19.47, leaving due on said judgment and said judgment to stand at $18,599.46, and the said judgment as so modified is hereby in all things affirmed, with $83.07, costs of the said appeal to the general term, to be paid by said George K. Otis to the said The Oregon Steamship Company.

Take notice that the within is a copy of a judgment which has on this day been entered in this case in the office of the clerk of the city and county of New York.

Dated N. Y., August 27, 1883.

HOLMES & ADAMS,
Att'ys for Pl't'ff and Resp'd't, 35 Wall street, N. Y.

111 *Notice of Appeal to Court of Appeals.*

New York Supreme Court, First Department.

THE OREGON STEAMSHIP COMPANY, Pl'ff and Resp'd't,
vs.
GEORGE K. OTIS, Def't and App'l't.

Take notice that the above-named defendant hereby appeals to the New York court of appeals from the judgment of the general term of the supreme court of the State of New York in this action, entered in the office of the clerk of said court, in and for the city and county of New York, on the 27th day of August, 1883, which said judgment affirms the judgment of the trial court theretofore entered as modified, &c., and defendant also appeals from the order of affirmance of the general term of said court on which said judgment was entered, and from each and every part of said judgment and order.

Dated 31st August, 1883.

Yours, &c.

JOHN SESSIONS,
Attorney for Defendant and Appellant.

To Holmes & Adams, Esqs., attorneys for plaintiff and respondent, and Patrick Keenan, Esq., clerk.

112 STATE OF NEW YORK, }
City & County of New York, } *ss:*

I, Patrick Keenan, clerk of the supreme court in and for said county, do hereby certify that the foregoing consists of certified copies of the notice of appeal and the judgment-roll on file in my office.

In witness whereof I have hereunto set my hand and affixed my official seal, this twenty-ninth day of September, A. D. 1883.

[L. S.] PATRICK KEENAN, *Clerk.*

113 Court of Appeals.

OREGON STEAMSHIP COMPANY, Plaintiff, Respondent,

vs.

GEORGE K. OTIS, Defendant, Appellant.

On the affidavit hereto annexed, and on motion of John Sessions and John R. Abney, counsel for appellant, it is—

Ordered, That a stay of the filing of the remittitur in this case be, and the same hereby is, granted for twenty days from this date for further action in the case.

Nov. 25th, 1885.

CHAS. A. RAPALLO,
Judge Court of Appeals.

114 Court of Appeals.

OREGON STEAMSHIP COMPANY, Plaintiff, Respondent,

vs.

GEORGE K. OTIS, Defendant, Appellant.

CITY & COUNTY OF NEW YORK, *ss.:*

John R. Abney, being duly sworn, says that he is of counsel for the appellant in the above-stated case, and recently argued the same before the court of appeals; that he read in the newspapers this morning the announcement of the decision of said court in said case on yesterday, and such reading was his first knowledge of the decision; that as soon thereafter as he could, and before even having a consultation with the attorney in the case, he telegraphed to the clerk of the court of appeals asking him to hold remittitur and to send a copy of the opinion to deponent, and also wrote said clerk stating that the counsel for appellant wished to move the court for a

115 stay for a rehearing and for writ of error to the United States Supreme Court; that shortly before three o'clock in the afternoon, as well as deponent now remembers, he received a telegram purporting to be from said clerk saying "Remittitur just gone; see Adams and stop it; E. O. Perrin, clerk;" that deponent supposed said telegram referred to Mr. Adams, of the firm of Holmes & Adams, attorneys for the respondent, and he therefore consulted with the attorney for the appellant as to seeing Mr. Adams, and said attorney proposed to see him forthwith; that deponent later in the

afternoon received a note from said attorney saying that he had seen Mr. Adams, and the remittitur was expected to arrive to-morrow morning, and that Mr. Adams would hold the same until after said attorney could consult with him, provided he did so on Friday next; and that very late in the afternoon deponent received information from said attorney's office saying that the firm of Holmes & Adams had retracted any promise to hold the remittitur and would file the same on Friday next at half-past nine o'clock in the morning.

116 Deponent further says that the appellant was held to bail in this case, which involves now about twenty thousand dollars, & — he is informed by his client, believes the decision of serious moment to him; that deponent does not yet know anything of the contents of the opinion of the court, but he believes there are questions in the case which will warrant appellant's counsel in asking the court for a rehearing; and that deponent believes the question raised as to the validity of the contract contended for by respondent is a Federal question, and as such is appealable to the Supreme Court of the United States.

Deponent therefore asks for a stay of the filing of the remittitur for twenty days in order to enable the counsel for appellant to look into the opinion and record and move for a rehearing and for a writ of error to the Supreme Court of the United States; also that the remittitur be ordered returned to the clerk of the court of appeals for its further action.

JOHN R. ABNEY.

Sworn to before me this November 25, 1885.

CHAS. A. RAPALLO,
Judge C't of Appeals.

117 Court of Appeals.

THE OREGON STEAMSHIP COMPANY *against* GEORGE K. OTIS.

CITY & COUNTY OF NEW YORK, *ss:*

William F. Paton, being duly sworn, says that he is of the age of fifteen years and upwards; that on the 30th day of November, 1885, between the hours of 9.30 a. m. and 12 m., at No. 32 Pine street, in the city of New York, he served John Sessions, the attorney of the defendant, George K. Otis, the appellant herein, with the annexed notice of motion by leaving the same with the person in charge of said office, in the absence of said John Sessions.

And he further says that he knew the person served to be the person in charge of said office, and that said office was the office of said John Sessions and his said address as defendant's attorney in this action.

WILLIAM F. PATON.

Sworn before me this first day of December, 1885.

EDW. B. HAWKINS,
Notary Public N. Y. City & Co.

118 N. Y. Court of Appeals.

THE OREGON STEAMSHIP COMPANY *vs.* GEORGE K. OTIS.

Take notice that on the affidavit of John R. Abney, sworn to November 25, 1885, on the remittitur herein, on the opinion of this court, and on all the proceedings herein, we shall make a motion before this court, at the court-rooms at Albany, on Tuesday, December 8, 1885, at the opening of the court, or as soon thereafter as counsel can be heard, to vacate, with costs, the order herein of November 25, 1885, staying the filing of the remittitur herein, and for such other and further relief as shall seem proper.

Dated New York, November 30th, 1885.

HOLMES & ADAMS,
Attorneys for Plaintiff and Respondent.

To John Sessions, Esq., attorney for appellant and defendant.

119 Court of Appeals of New York.

OREGON STEAMSHIP COMPANY, Respondent,
against
GEORGE K. OTIS, Appellant.

On the annexed affidavit and on motion of John Sessions and John R. Abney, counsel for the appellants, it is—

Ordered, That Holmes & Adams, Esq'rs, attorneys for the respondent, show cause before the court of appeals, at Albany, on the twenty-second day of December, 1885, at ten o'clock in the forenoon of that day, why they should not be required to return to the clerk of the court of appeals the remittitur and record in the above-stated case.

It is further ordered that the filing of said remittitur and record be, and the same hereby is, stayed until said day and the further order of the court of appeals.

120 Let a copy of this affidavit and order be served on said attorneys for the respondent and on the county clerk.

Dated December 12, 1885.

CHAS. A. RAPALLO,
Judge Court of Appeals.

121 Court of Appeals of New York.

OREGON STEAMSHIP COMPANY, Respondent,
against
GEORGE K. OTIS, Appellant.

CITY & COUNTY OF NEW YORK, *ss:*

John R. Abney, being duly sworn, says: That since the order staying the filing of the remittitur in this case was made and served on Messrs. Holmes & Adams, attorneys for the respondent, and the county clerk, the Supreme Court of the United States has issued a writ of error to the honorable the judges of the court of appeals of

New York, commanding them to send the record and proceedings in this case, with all things concerning the same, to said Supreme Court of the United States, together with said writ of error, so that they have the same at Washington on the second Monday of October next; that deponent has requested said attorneys for the respondent, which attorneys are in possession of said remittitur
122 and the record, to return the *the* same to the office of the clerk of the court of appeals, in order that a transcript of said record could be made and the said writ of error fully complied with; but that said attorneys have refused such request.

Wherefore deponent asks that an order be granted requiring said attorneys to show cause why they should not be ordered to return said remittitur and record to the clerk of the court of appeals for the purposes aforesaid.

Deponent further says that no similar order, except as above stated, has been applied for in this cause.

JOHN R. ABNEY.

Sworn to before me this December 12, 1885.

CHESTER C. HOWE,
Notary Public, N Y. Co.

123 Court of Appeals.

THE OREGON STEAMSHIP COMPANY *vs.* GEORGE K. OTIS.

CITY AND COUNTY OF NEW YORK, *ss:*

George H. Adams, being duly sworn, says: That I am one of plaintiff's attorneys and counsel herein; that after the decision in affirmance was handed down by this court on my request the clerk of this court sent my firm, in usual course, the remittitur. Before the remittitur was filed an order of the court was served, staying the filing of the remittitur on affidavit of defendant's counsel that it was desired to make an application for reargument or for a writ of error to the U. S. Supreme Court. About December 7th, inst., I was informed that a writ of error had been issued and was about to be served on this Court, and I then, on that day, wrote to Mr. Perrin that I was so informed, and saying: "When the writ of error is served on you, notify us if we must send back the remittitur;" to this Mr. Perrin replied that, in his opinion, on appeals to Supreme Court no papers were filed in or required from his office, which I understood to be an intimation from him that the remittitur should not be returned to the court of appeals. This coincided with my opinion of the proper practice, viz: That when the remittitur
124 has been delivered or sent down it should go on record in the court below, whose clerk should then certify the whole record to the Supreme Court of the United States, either directly or through the court of appeals. My opinion was founded on the following cases, among others:

Gelston *v.* Hoyt (3 Wheaton, 246).
McGuire *v.* Commonwealth (3 Wall., 382).
Green *v.* Van Buskirk (3 Wall., 450), &
Atherton *v.* Fowler (91 U. S., 143).

On the 15th December, instant, I sent a letter to defendant's attorney, of which the following is a copy:

"After speaking with you to-day in reference to the remittitur in Oregon S. S. Company *v.* Otis, I have re-examined the authorities on the practice, and, after a consultation with Mr. Holmes, I have concluded not to return the remittitur to the clerk — court of appeals at present.

"We now propose that you stipulate that we may file the remittitur in the usual way, and we will stipulate that the county clerk shall at once certify a copy of the record back to clerk — court of appeals, and that he at once certify that record to the Supreme Court as his return to the writ of error.

"The case of Green *v.* Van Buskirk contemplates no other proceeding. We will also stipulate that no execution shall issue under judgment for three days after entry of judgment, in order that you may have time to file your supersedeas bond.

"An early reply will oblige."

This offer the defendant's counsel refused.

125 Since the remittitur has come to the hands of plaintiff's attorneys proceedings thereon have been stayed. There has been no desire to obstruct the return to the writ of error, but only to see that plaintiff's judgment is properly secured.

GEORGE H. ADAMS.

Sworn to before me this 21st day of December, 1885.

EDW. B. HAWKINS,
Notary Public, N. Y. C. & Co.

126 STATE OF NEW YORK:

In Court of Appeals.

At a court of appeals for the State of New York, held at the capitol, in the city of Albany, on the twenty-third day of December, A. D. 1885.

Present: Hon. William C. Ruger, chief judge, presiding.

THE OREGON STEAMSHIP COMPANY *vs.* GEORGE K. OTIS.

A motion having heretofore been made on the part of the defendant for the return to the clerk of this court of the remittitur heretofore issued in the above-entitled action and the record herein, after hearing Mr. A. L. Sessions for the motion and Mr. George H. Adams opposed, and due deliberation having thereupon been had—

Ordered, That said motion be, and the same hereby is, granted, and that the plaintiff's attorneys be, and they are hereby, required to

return said remittitur and the record herein to the clerk of this court.

A copy.

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND,
Deputy Clerk.

[Endorsed:] State of New York. In court of appeals. Order.

Endorsed on cover: New York court of appeals. No. 1250. George K. Otis, plaintiff in error, *vs.* The Oregon Steamship Company. Filed January 18, 1886. [Stamped:] Office Supreme Court U. S. Filed Jan. 18, 1886. James H. McKenney, clerk.

116-548

EVENING POST JOB PRINTING OFFICE—N. Y.

Supreme Court of the United States. 1

GEORGE K. OTIS,
Plaintiff in Error,

vs.

THE OREGON STEAMSHIP COMPANY,
Defendant in Error.

Take notice, that on the 25th day of January 1886, at 2
the Supreme Court rooms in the Capitol, at the City of Washington, District of Columbia, we shall make a motion before this Court, at the opening thereof on that day, or as soon thereafter as counsel can be heard, for a dismissal of the writ of error herein issued to the Court of Appeals of the State of New York, and dated the 4th day of December A. D. 1885, to review an alleged judgment of said Court of Appeals, in favor of said Oregon Steamship Company and against said George K. Otis; and that said motion will be made on the record returned from said Court of Appeals, and such dismissal asked for on the following grounds:

3

1. Because the decision of said Court of Appeals in this cause against each and every of the claims and defenses herein of said plaintiff in error, was expressly based on the decision of a question or questions other than of a Federal character.

4 2. Because the decision of this cause and the alleged judgment of the said Court of Appeals was not necessarily based upon and did not necessarily involve any Federal question.

3. Because in the decision of this cause by the said Court of Appeals there was not presented and decided adversely to the claim or defense of the plaintiff in error any Federal question.

4. Because in this cause, or before said Court of Appeals, said plaintiff in error did not set up, specifically or otherwise, a title, and did not claim or defend upon a title, under a statute of the United States, and the decision of
5 said Court of Appeals was not against any such title, claim or defense.

5. Because in this cause, or before said Court of Appeals, said plaintiff in error did not set up, specifically or otherwise, a title, and did not claim or defend upon a title, under a commission held under the United States, and the decision of said Court of Appeals was not against any such title, claim or defense.

6. Because in this cause, or before said Court of Appeals, said plaintiff in error did not set up, specifically or otherwise, a title, and did not claim or defend upon a title, under an authority exercised under the United States, and
6 the decision of said Court of Appeals was not against any such title, claim or defense.

7. Because in this cause, or before said Court of Appeals, said plaintiff in error did not set up, specifically or otherwise, a right, and did not claim or defend upon a right, under a statute of the United States, and the decision of said Court of Appeals was not against any such right, claim or defense.

8. Because in this cause, or before said Court of Appeals, said plaintiff in error did not set up, specifically or otherwise, a right, and did not claim or defend upon a right,

under a commission held under the United States, and the decision of said Court of Appeals was not against any such right, claim or defense. 7

9. Because in this cause, or before said Court of Appeals, said plaintiff in error did not set up, specifically or otherwise, a right, and did not claim or defend upon a right, under an authority exercised under the United States, and the decision of said Court of Appeals was not against any such right, claim or defense.

10. Because no final judgment or decree has been rendered in any suit in said Court of Appeals in favor of said defendant in error against said plaintiff in error, or otherwise. 8

11. Because the order of the said Court of Appeals, dated November 24, 1885, known as the *remittitur*, which affirms the judgment of the Court below, is not a judgment or decree, and is totally ineffectual for any purpose until and unless the same be according to its terms "remitted into the Supreme Court of the State of New York, before the Justices thereof, * * * to be enforced according to law," and until and unless the same be made a part of the record in said suit, "which record now remains in the said Supreme Court before the Justices thereof."

Dated N. Y. Jany 4 1886.

Yours, &c., 9

HOLMES & ADAMS,
Attorneys for the Oregon Steamship Company, Defendant in Error.

To JOHN SESSIONS, Esq.,
Attorney for George K. Otis,
Plaintiff in Error.

[H 6537]

116-648

United States Supreme Court.

GEORGE K. OTIS,
Plff. in Error,

vs.

THE OREGON STEAMSHIP COMPANY,
Deft. in Error.

Brief of Defendant in Error on Motion to Dismiss Writ.

This is a motion to dismiss a writ of error issued to the Court of Appeals of the State of New York, to review a judgment in this cause.

A dismissal is asked on the following grounds:

1. The supposed federal question was not raised, specifically or otherwise, in the Court of Appeals, and was not decided by that Court.

2. The question depended on, to give this Court jurisdiction, is not a federal question.

3. The said question was not necessarily involved in the judgment sought to be reviewed.

4. No final judgment has been entered; the order of the Court of Appeals, affirming the judgment of the New York Supreme Court, being a simple remission to the lat-

ter Court of certain copies of papers and copies of a judgment of record in the latter Court, with directions to the Supreme Court to enforce its (the Supreme Court's) said judgment.

The plaintiff in error, Otis, was sued in this action for about $13,000, a portion of mail pay received by him from the United States for the account of, or on agreement to pay it over to, the defendant in error, the Oregon Steamship Company, but which he had withheld from the company. The Court found that for a period between June, 1874, and June, 1878, the company carried all the mails and performed all the mail service on a certain mail route between San Francisco and Portland, Oregon; that this service was done in performance of and under a mail contract with the United States in which Otis was named as the contractor; that in entering into this contract Otis was acting as agent for and for the benefit of the Steamship Company; that of the $100,000 mail pay provided for by the contract Otis had collected all except certain deductions for non-service, and was entitled to retain as his agreed compensation for obtaining said contract and collecting the pay thereon $2,500; that he had paid over to the company all the balance of said collections above his said compensation, excepting about $13,000, for which judgment with interest was awarded against him.

What the plaintiff in error claims to be a federal question is not disclosed by the record; but it may be stated to be this: that the U. S. Statutes (U. S. R. S., §3963) provide that "No contractor for transporting the mail * * * shall assign or transfer his contract, and all such assignments or transfers shall be null and void;" that this statute in effect rendered it unlawful for him to enter into the mail contract as the agent or for the benefit of the company; or, that because of the statute the relation found by the Court to be existing between him and the company in this respect was illegal and against public policy; and that, therefore, the company should not recover the money adjudged to be remaining in his hands over and above his agreed commissions or compensation.

While the record does not suggest, much less formulate,

the claim of plaintiff in error in this respect, it is believed that the point is stated above most strongly against the defendant in error.

I.

THE QUESTION, ASSUMED TO BE FEDERAL, WAS NOT SPECIFICALLY RAISED UPON, NOR IS IT TO BE LEGITIMATELY INFERRED FROM, THE RECORD.

The complaint below sets up the fact, and this is a question of fact, that "as agent for the plaintiff," the defendant entered into the mail contract (page 2). The answer admits the making of the contract and certain other matters, but defendant (plaintiff in error) "denies that he made and entered into said contract as agent of plaintiff" (page 5).

This allegation of the answer of itself cannot be claimed to put in question the *legality* of the relation of agency, if the *fact* of agency should be found against the defendant.

The answer does not contain the general issue, although it denies such part of the complaint as is not specifically denied; this cannot apply to the matter of agency, as that is specifically denied. However, a defense that the contract set forth in the complaint is illegal on general principles of the common or statute law of New York, and certainly, that it is illegal constructively because of a statute of the United States, must in the Courts of New York be specially pleaded, otherwise it cannot be availed of.

The Code of Civil Procedure, section 500, prescribes that the answer must contain "a statement of any new matter constituting a defense."

In Schreyer *vs.* Mayer, 39 N. Y. Superior Ct., 1, the action was to recover certain installments under a contract; the General Term of the Superior Court held the contract to be illegal and contrary to public policy under t e laws of New York, but that "the objection that a

contract which is fair upon its face is illegal or contrary to public policy, must be taken by answer;" that otherwise it could not be taken advantage of by defendant, even on a motion for nonsuit.

See also Stafford Pavement Company *vs.* Monheimer, 41 Superior Ct., 184.

The same ruling has been made by the General Term of the N. Y. Common Pleas, in Boswell *v.* Welshofer, 9 Daly, 196; by the General Term of the Supreme Court, in O'Toole *v.* Garvin, 1 Hun, 92; and by the Court of Appeals, in Cummins *v.* Barcalow, 4 Keyes, 514, 524. The case of Oscanyan *v.* Arms Co. (103 U. S., 261), was in error to U. S. Circuit Court in New York, and though it seems to maintain that the illegality may be availed of under the general issue, yet that was under the practice in the U. S. Courts, and the illegality was apparent in the opening of the case, and was at once taken advantage of. But whatever may be the effect of the Oscanyan case, or the rule in the Courts of the United States, or at common law, here the only question is, did this answer, interpreted according to the law of pleading in New York Courts, alone entitle plaintiff in error to claim in the Court of Appeals that the contract was illegal or forbidden by a statute of the United States, which was not pleaded, and was not read in evidence. As to the effect of the statutes and rules in the Courts of New York as to pleadings and conduct of trials, this Court will follow the decisions of the State Courts.

It may be averred, therefore, that the "right" or "title" claimed by plaintiff in error was not raised, specifically or otherwise, in the pleadings.

The authorities hold that in the N. Y. Courts the point, if not pleaded could not be taken; that is, was not before the Court; now, as matter of fact it does not appear anywhere in the record to have been taken.

At the close of the plaintiff's case below no motion was made for a nonsuit on this or any other ground (page 55); nor was any such motion made at the close of the whole case (page 62).

The statute of the United States relied on was not introduced in evidence, nor otherwise, on the record, called to the attention of the Court; statutory law, other than of New York, must be not only pleaded but proved (Cutter *v.* Wright, 22 N. Y., 472); it must be introduced at the trial, otherwise it cannot be offered on appeal (Hunt *v.* Johnson, 44 N. Y., 27); in the absence of *proof* of foreign law, the law of New York must furnish the rule of decision (Savage *v.* O'Neil, *id.*, 298).

The findings proposed to the Trial Court by the plaintiff in error, at the close of the trial, according to the New York practice, disclose no such point or claim; the absence at this place of any such claim is very significant evidence that no such claim was made. (See the proposed findings at page 62.)

The record will be searched in vain for the slightest intimation that the point was suggested in any way.

This Court has often decided that it will not search the record to see if the "requisite question might have been raised and presented for decision" (Detroit R'y *v.* Guthard, 114 U. S., 136); and that it will not resort to the *opinion* of the State Court, whose decision is to be reviewed.

While the opinion of the Court of Appeals, made when rendering the judgment to be reviewed, forms therefore no part of the record, and will not be resorted to by this Court to ascertain whether a Federal question was raised or discussed, the plaintiff in error may claim that the opinion of the General Term of the Court below (that Court *in banc*, at page 82), indicates that such a point was raised in the latter Court.

The opinion of the General Term is not, strictly speaking, a part of the record; it is by a rule (5) of the Court of Appeals required to be inserted in the appeal book, for the information of that Court, but it is not "of record" anywhere.

Of course, this opinion, if resorted to at all, does not support a claim that the federal question was necessarily raised or brought to the attention of the Court of Appeals, whose judgment alone is to be reviewed here. But at most this opinion shows that the "validity of such a transaction (that is, the validity of the relation of agency)

* * has already been determined by this Court in this case on a former appeal. (See Oregon S. S. Co. *v.* Otis, 27 Hun, 452.)" If this Court is then entitled to resort to Volume 27 of Hun's Reports, it will be found that the General Term of the Supreme Court did *discuss* the validity of the agency, and for several errors, possibly including that one, ordered a new trial of this action.

If Otis had chosen to review that judgment he could have appealed therefrom to the Court of Appeals, and in that appeal could have carried up this question if it were in that first record. (This right is given by §§ 190 and 1324 of New York Code of Civil Procedure.) But he did not choose to review that judgment; on the contrary, he went back for the new trial under the order of the General Term awarding it (see the new order of reference and its recitals at page 7).

Now, whether Otis raised the assumed Federal question on the first trial so as to call forth that first judgment of the General Term on this point, cannot be found out from this record; but if he did, having the opportunity to take that to the Court of Appeals, he waived that right, went back to a new trial, and made this record which contains no reference whatever to such a question. The Trial Court was, of course, bound on the second trial by the decision of the General Term on the first appeal, and on the second appeal the General Term made the reference to its former decision quoted above, although the point was not before it.

Now, though Otis had failed to carry the assumed Federal question to the Court of Appeals after the first trial, and had failed to raise it in the record on the second, a way was still provided him of reviewing the General Term's first decision on this point; the mode of doing this on appeal to the Court of Appeals is set forth and strictly limited by sections 1201 and 1316 of the Code, which prescribe that "where the appellant intends to bring up for review * * * an interlocutory judgment or an intermediate order, he must, *in the notice of appeal, distinctly specify* the interlocutory judgment or intermediate order to be reviewed;" and "an appeal taken from a final judgment brings up for review an interlocutory judgment, or

intermediate order, which is *specified* in the notice of appeal, and *necessarily affects the final judgment*, and which has not been already reviewed upon a separate appeal therefrom."

Otis's notice of appeal in this record (page 80) did not specify that former judgment of the General Term, and, therefore, it was not before the Court of Appeals; and the highest Court of the State has never been called upon to decide, nor has it, necessarily, decided, one way or the other, the question which is now claimed to be federal.

If this question ever was in a record of this cause, and was ever presented for decision, it was so presented before the Supreme Court, General Term, at the first appeal; but the writ of error does not and cannot run from this Court to review that judgment. The plaintiff in error had two opportunities of presenting that question to the Court of Appeals for decision, if he ever raised it anywhere, once by appeal from the first judgment of the General Term granting a new trial, and again by bringing that judgment up to the Court of Appeals on his appeal there from the second judgment of the General Term; he failed to do so on both occasions, and the highest Court has never had the point before it.

This Court has over and over again held that it will not reverse the decision of the State Court because a Federal question was raised. All a writ of error must rely alone on such reasons; but be only from the Court say "This question does not appear by the record to have been specifically raised"

THE QUESTION IS NOT A FEDERAL QUESTION, EVEN IF IT APPEARED IN THE RECORD.

The plaintiff in error, in his petition, declares that the judgment below was against him as to a title or right claimed under a statute or commission held, or authority exercised under, the United States; that is, under the third class of federal questions of section 709, U. S. R. S.

Just what this right or title was, it is difficult to determine, in the absence of any plea or exception asserting it.

That Otis made the contract; that he made it in his own name; that in so doing he was acting as the agent and for

the benefit of the company, which implies that he intended and agreed to act as such agent and for such benefit; that the company carried all the mails and performed the contract; that Otis received the mail pay, paid part over to the company, and retained a portion from the company over and above that part which had been agreed he should retain; all these facts are found by all the Courts below, and must be conclusively assumed to be true here. What, then, is the "right" or "title" denied him, by adjudging that these facts lead to the recovery of the money retained contrary to his agreement? Has he a "right" or "title" to rescind or default upon his agreement to pay over certain proportions of the mail pay; and is this a right or title derived from the statute which forbids him to assign or transfer his contract?

The Government forbids such an assignment, probably, because it would lead to great inconvenience to have these contracts pass from one person to another, shifting the responsibility for the mail service, and affecting the liability of the bondsmen of the contractor. It has, however, never been in the contemplation of the Government that the contractor should himself carry the mails, or that he should not employ such means, or enter into such arrangements, for the actual mail carriage, as should be necessary.

But even if it be assumed here that the effect of the statute is to condemn an arrangement by which one should contract in his own name, while, in fact, he is acting as the agent or for the benefit of another, still a contrary interpretation by a State Court would not raise a federal question, because to hold the agency legal is not a decision against any right or title of Otis. He cannot be said to have any *right* or *title* resting solely in the illegality of his own agreement. In a loose sense Otis might have claimed that to deny that the agency was unlawful was to deny him an "immunity," or "privilege;" for the right to defend against a contract obligation which is illegal, may possibly be an immunity, though it is not likely that this is the "immunity" of the statute; however, the plaintiff in error does not take this ground, and his only complaint is the denial of a *right* or *title*, neither

of which involved a negation of, or a release from, obligation, like "*immunity*" or "*privilege.*"

It does not detract at all from the absurdity of this attempt to make out a federal question to say that the right or title is claimed under a commission or under an authority exercised under the United States.

III.

AN ERRONEOUS CONSTRUCTION OF THE U. S. STATUTE BY THE COURT OF APPEALS WOULD NOT, IN THIS CASE, RAISE A FEDERAL QUESTION.

The following principles long established in this Court, apply to this case:

If the State Court has rested its judgment on some point in the case not within the purview of section 709, and that point is broad enough to sustain the judgment, then, although the ruling of the State Court might be reversed on the point of federal cognizance, this Court will not entertain jurisdiction of the case.

Rector v. *Ashley*, 6 Wall., 142.

Since the record does not show "that a question under the Constitution of the United States, was raised in the State Court, and as that Court might have decided the case without passing on such a question, this Court has not jurisdiction."

Mills v. *Brown*, 16 Pet., 525.

Should the Supreme Court come to a different conclusion from the Court of Appeals as to the effect of the United States statute relied on as involving a federal question; and if it should then appear that the final determination of the State Courts giving the steamship company a recovery did not necessarily rest on one or the other inter-

pretation of this statute, in such case this Court will not entertain jurisdiction. This Court will at most take up only the matter supposed to be of federal cognizance, namely, the right or title which Otis claims under such a construction of the statute as would make it unlawful for him to take the mail contract as the agent of the steamship company, or such as would make the relation of agency to the company unlawful in this particular; suppose this Court should come to the conclusion contended for by Otis, and determine that this relation and Otis's acts thereunder were contrary to law and public policy, and should remit the proceedings to the State Court to apply such construction, the only effect of this would be that the State Court would still enforce its former judgment on two grounds with which this Court could not interfere;

1st, that though the agency, or the contract creating the agency were illegal, such illegality could not operate as a defense as between those entitled to the proceeds, when the contract has been executed and the proceeds received by the defendant. (McBlair *v.* Gibbes, 17 How., 232; Brooks *v.* Martin, 2 Wall., 70. We omit citations of N. Y. cases where the same rule is enforced);

And 2nd, that however unlawful it may have been for the parties to agree to apply for and obtain a mail contract in Otis' name for the company's benefit, and though it may be decided that Otis was the real contractor and always remained the only party in interest in the contract, yet another and entirely distinct agreement between these parties has been adjudged, having no sort of dependence on the agreement of agency, namely :

That the company carried all the mails contracted for ; that Otis collected all the mail pay, amounting to $97,131.49 ; that "it was agreed between the plaintiff and defendant that out of the mail pay collected and received by him as aforesaid, the defendant should retain * * * * two and one-half per centum of said moneys so received and no more ;" that two and one-half per cent. was $2,500 (Special Finding of Fact, page 11); and that therefore the company is entitled to the balance as adjudged, upon this simple agreement, which does not involve agency or any other relation than arises from an

independent agreement to divide the mail pay as it was earned and received, part to the company for doing the actual service, and part to Otis for collecting the pay and for his trouble generally. Discard entirely from the findings and decision of the Court everything relating to the "agency," or to the effect that Otis in taking the contract was acting for the benefit or in the interest of the company, and still the judgment for the recovery of the balance of the portion to come to the company by agreement must stand unassailed.

This test is fatal, according to Mr. Justice Story, who said in *Crowell* v. *Randall* (10 Pet., 368), "that the question * * * must have been decided in order to have induced the judgment;" and Mr. Justice Catron, in *Armstrong* v. *Athens Co.* (16 Pet., 281), that it should appear "that the State Court could not have given the judgment or decree without deciding such a question;" and Mr. Justice Miller in *Murdock* v. *Memphis* (20 Wall., 590) that it is essential to the jurisdiction of this Court over the judgment of a State Court "that its decision (the federal question) was necessary to the judgment or decree rendered in the case; * * * and if it (the federal question) was erroneously decided, * * * then this Court must further inquire whether there is any other matter or issue adjudged by the State Court which is sufficiently broad to maintain the judgment of that Court, notwithstanding the error in deciding the issue raised by the federal question;" and Mr. Chief Justice Waite, in *Balling* v. *Lersner* (1 Otto, 594), said: "We cannot re-examine the judgment * * * simply because a Federal question was presented to that Court for determination. To give us jurisdiction it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered;" and in *Citizens' Bank* v. *Board of Liquidation* (8 Otto, 140), the Chief Justice said: "It is not only necessary that some one of the questions mentioned in the section should exist on the record, but that the decision was controlling in the disposition of the cause."

All these questions have again been passed upon in Detroit R. R. *v.* Guthard, 114 U. S., 133, not only as to the

necessity of its appearing by the record that the Federal question was specifically raised, but also that the State Court denied a "right" or "title" so specifically set up and claimed by the plaintiff in error, and also that such denial was controlling in the cause, without which plaintiff in error must have had judgment.

See also Jacks *v.* Helena, 115 U. S., 289.

If research be made, against an objection, before Court of Appeals (they will be found to say "Mds not find that fact (the U.S. Statute) could operate to create the liability to the plaintiff as far as the money actually received was concerned" (the rule in Brooks v. IV. Marlow supra)

NO FINAL JUDGMENT HAS BEEN MADE WHICH THIS COURT CAN REVIEW.

It is submitted that this case is, and should be, distinguished from *Atherton* v. *Fowler* (91 U. S., 143), and *Mower* v. *Fletcher* (114 U. S., 127); both of these cases were to review judgments of the California Supreme Court; in Atherton *v.* Fowler this Court said the California Supreme Court had and kept a record of which it was the custodian (149), and in *Mower* v. *Fletcher* that the affirmance by the California Supreme Court was "final for the purposes of a writ of error to the Court, * * * so that if there should be an affirmance here, the Court below (that is the California Supreme Court) would have nothing to do but to execute the judgment it had already rendered."

But the difficulty in this case is that the New York Court of Appeals has rendered no judgment, final or otherwise; by the law of the State that Court keeps no record; there is nothing recorded, nothing entered of record in that Court or in the office of its clerk; on appeal to that Court, the inferior Court sends up a certified copy of the proceedings below, and upon this, as a *copy* of the record still remaining in the Court below, the Court of Appeals proceeds to act in error; upon an affirmance, as in this case, this same certified copy-record and the notice of appeal go back bodily to the inferior Court, and attended by the *remittitur*, which is an *order* of the Court of Appeals affirming the

order or judgment below, and ordering that the respondent have costs, which are ascertained and entered below; this *remittitur* is not a copy of an order "*entered*" in the Court of Appeals, it is the original and only evidence of the action of that Court; no copy of it even is kept in that Court; and it has effect only when *entered*, where the law declares it should be, in the Court below; then, and not till then, when it becomes in legal effect attached to the *postea* in the original record, which has never left the Court below, it becomes of record itself, and is in effect a judgment.

No execution can issue on the action of the Court of Appeals or on the *remitittur* under any circumstances, nor in the suit itself, until this *remittitur* has been made of record by being filed in the proper place. By the proceedings of plaintiff in error, and his endeavor to bring up in this way the decision for review, the defendant in error is prevented from proceeding to execution on his judgment of the New York Supreme Court, the only "judgment" in the action; the Company is effectually stayed, because the fact of the affirmance by the Court of Appeals cannot be made to appear in the original record in the New York Supreme Court, and not because of any supersedeas bond given by plaintiff in error; plaintiff in error, under this practice, need give no supersedeas bond, while during the long delay in the calendar of this Court, defendant in error may not issue execution and yet have no security.

The writ of error cannot act as a supersedeas, because it has gone to the Court of Appeals, where the record does not remain, and where there is now no record; whereas, if it had gone to the New York Supreme Court, "where the record remains," it would have acted as a supersedeas under the 25th section of the Judiciary Act; but although this section is not complied with, and no bond is given, the defendant in error is by this procedure effectually stayed without security. This case is precisely similar to that of *Green* vs. *Van Buskirk* (3 Wall, 448, 450), except in the character of the relief there asked.

V.

THE WRIT OF ERROR SHOULD BE DISMISSED.

Respectfully submitted,

GEORGE H. ADAMS,
Of Counsel for Deft. in Error.

HOLMES & ADAMS,
Attorneys for Defendant in Error.

116 548
-548

C. S. Hamilton & Co., Printers, 12 Barclay St, N. Y.

Office Supreme Court U. S.
JAN 25 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

GEORGE K. OTIS,

Plaintiff in Error,

vs.

THE OREGON STEAMSHIP COMPANY,

Defendant in Error.

Brief of Plaintiff in Error on motion to dismiss writ.

The motion to dismiss the writ of error appears to be based upon the ground that this Court has not jurisdiction of the case. In opposition to the motion it is submitted that the brief filed by the defendant in error fails to show want of jurisdiction. And, while the plaintiff in error does not regard it incumbent upon him on the argument of this motion to show jurisdiction further than was shown when the writ was allowed, he nevertheless submits that the jurisdiction of this Court is made manifest by reference to the record.

STATEMENT.

The matter in dispute is a contract, in writing and under seal, granted by the United States to the plaintiff in error under the Post Office laws. The State Court has decided against the right and title of the plaintiff in error in and to said contract. And the plaintiff in error now claims that the State Court committed both error of law in the construction of the Mail Contract Laws, and error of fact in finding that he is not the owner of said contract.

The facts are briefly these:

The Oregon Steamship Company, in 1879, brought this action against Otis in the Supreme Court of New York, alleging in its complaint that Otis, as its *agent*, made and entered into "a certain steamboat contract" with the United States of America for the transportation of the mails of the United States between San Francisco, California, and Portland, Oregon, for four years from June 1, 1874; and that he had collected the pay from the United States and converted about $13,000 thereof to his own use. Otis filed his answer, denying that he nad made any contract as agent of the Oregon Steamship Company, and that he had converted any of its money to his own use. The case was referred to a Referee. The Oregon Steamship Company failed to produce in evidence a contract made between the United States and it, as the allegations of the complaint called for. The evidence only shows a contract made between the United States and Otis, in his own right. The evidence also shows that Otis, in his own right, filed the bid for the contract, and that he deposited, out of his own property, the check required by law to accompany the bid. The evidence also shows the affidavit of Otis, to the effect that he had the ability, pecuniarily, to fulfill his obligation as bidder, and the affidavit to the effect that he would faithfully perform all the

duties required of him. The Oregon Steamship Company introduced other testimony to show by way of *inference* that this contract must have been made for it. Against this evidence, introduced to contradict the declaration of ownership on the face of the contract, Otis contended that the testimony was not sufficient to prove that he was only agent and the Steamship Company the real owner of the contract; and that if it were sufficient, such secret title as that claimed by the company would be void, because forbidden by the Mail Contract Laws. The first Referee sustained Otis' title and dismissed the complaint—thus sustainining Otis' points without his going on the witness stand. But a new trial was granted on appeal to the General Term of the Court, and the case was sent to a second Referee, and he, upon the same testimony for plaintiff (there), overruled the same positions taken by Otis, which positions were this time backed up by Otis' testimony, declaring that he never was the agent of the company, and did not make this contract as its agent, but in his own right. In his report the Referee says on the law point: "The defendant, in the contract with the U. S. Government, is the contractor, and on the face of the contract it is his contract. But though he was, as between him and the U. S. Government, the principal, yet it was lawful for him to make such a contract, and yet, as between him and the plaintiff, to make the contract for its benefit and on its behalf solely" (see Appeal Book, fols. 254–5). On the point of fact he says: "There is no direct evidence of the employment of Otis by the plaintiff to procure this contract for its benefit" (see *Ib.* fol. 253). But he infers that Otis was so employed. Otis duly excepted to the report and the finding of fact and conclusions of law (see *Ib.* fols. 301–2).

The case was appealed to the General Term and those points were again passed on. The Judges there accepted the opinion of the Referee as to the inference of fact; and as to the law point, they

say: "The validity of such a transaction, as between the parties hereto, has already been determined by this Court in this case on a former appeal."

From those adverse holdings an appeal was duly taken by Otis. The Court of Appeals decided against his right and title in and to said contract held under the United States.

Specification of Errors.

The plaintiff in error submits:

1. That the Court of Appeals erred in their construction of a Federal statute, to wit, the act of June 2d, 1872, embodied in the Revised Statutes, from § 3941 to § 3963, whereby they decided against his right and title to the mail contract, and that the secret ownership of the same set up by the defendant in error is lawful;

2. That the Court erred in deciding against his right and title in and to the contract, by holding that the proof is sufficient to establish agency.

There are other errors committed by the State court in proceeding to their decision against his title; such as the admission in evidence of copy telegrams. But they will be reserved for the argument of the case on its merits, as it is conceived to be unnecessary to state them on the argument of this motion.

POINTS.

I.

This Court has jurisdiction, because a right and a title were claimed by the plaintiff in error under the Statute of the United States, regulating the making

of mail contracts, and the decision of the State court is *against* the right and title (see U. S. Rev. Stat., § 709). It does not matter whether that decision is right or wrong, so far as this motion is concerned. The question of jurisdiction of this Court does not depend upon the correctness of the decision of the Court below.

Furman *vs* Nichol, 8 Wall, 44.
Beer Co. *vs.* Massachusetts, 97 U. S., 25.

By way of showing jurisdiction more particularly, however, I may be permitted to point out to some extent wherein the decision is erroneous. The Court of Appeals say: "The obvious aim of the enactment was to prevent a liability of the government upon the contract to any person but the accepted bidder." If that be so, then a verbal or secret assignment would be enforceable in the courts, and the statute easily evaded. But the statute covers verbal and secret, as well as written and known, assignments; and it does not say that such assignments shall be void *as against the government* only; it says they shall be *void*. That can only mean void *absolutely* (see U. S. Rev. Stats., § 3963). Especially is this obvious when the section is read with the other sections in the same chapter. The defendant in error attempts to evade the operation of this section by declining to claim any assignment, and setting up an original ownership. I submit that such a claim is *a fortiori* in contravention of the Statute. Why should the Statute prohibit a change in the ownership of these contracts *after* they are made, and yet permit an undisclosed party to own them at the time they are executed? There can be no reason given. If such secret ownership is not prohibited by the letter of § 3963 it is by its spirit. But, other sections inhibit it. Section 3946 requires the bidder to make an oath that *he* has the pecuniary ability to fulfill *his* obligations, and that the bid is made *in good faith*, and with the intention to enter into

contract and *perform the service*, in case his bid shall be accepted. If that section countenances a secret owner, it countenances perjury on the part of the bidder. Section 3950 says: "No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or promised, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract." This is directly aimed at secret understandings. Section 3954 declares that, "Any person or persons bidding for the transportation of the mails upon any route which may be advertised to be let, and receiving an award of the contract for such service, who shall wrongfully refuse or fail to enter into contract with the Postmaster-General in due form, and perform the service described in his or their bid or proposal, shall be deemed guilty of a misdemeanor, and be punished by a fine of not more than five thousand dollars, and by imprisonment for not more than twelve months." This section certainly does not contemplate any owner other than the known contractor. I submit that it declares against it in severe terms. In addition to all this, the contractor is required to make an affidavit that *he*, being employed in the care, custody and conveyance of the mail, will faithfully perform all the duties required of *him*. (See Otis' affidavit, dated April 10, 1874. Appeal Book, fols. 100–1). The law was passed in 1872 (17 Stats., 56, 316). The aim of Congress in passing it was to prevent "straw-bidding," frauds and *speculation* in mail contracts, and to secure bidders *in good faith*, as contradistinguishing from merely ostensible ones. It was to prevent just what the defendant in error is claiming. These evils had become so great, especially in the South, that the Postmaster General felt constrained to call attention to them in his report (See Annual Report

of November 18, 1871, p. x x x). The aim Congress had in view in passing those restrictive sections may be judged of in some measure by reference to the remarks of Senator Kellogg in the Senate, on December 21, 1871 (Part I, Cong. Globe, 1871-2, p. 260-1), and to those of Mr. Farnsworth, in the House of Representatives, on December 19, 1871 *Ib.*, p. 217). Senator Kellogg said, among other things:

"It is intended * * to cut off the efforts of these two classes to plunder the Treasury. One is the contractor, who really intends to carry the mail, if he can get the award, and the other is the intermediary or middleman, the strawbidder, as he is sometimes termed, who puts his bid upon file, makes his application, determined to procure the award, simply because it is below a paying figure, so to speak, and then, having received the award, compels the contractor to buy him out."

The aim of the enactment was not to prevent a liability of the government upon the contract to any person but the accepted bidder, as the Court of Appeals thought, but the aim was to make *some person* liable to the government, and to exclude all other persons from any ownership, either at the making of the contract, or afterwards. And, "a prohibition against doing an act prohibited extends to all indirect, roundabout, or covert attempts to do the thing forbidden."

See Jorralt *v.* Moberly, 103 U. S., 580.
In re Davidson, N. Y. Daily Reg., June 26, 1885.

If it be against the spirit of the Statute, it is included in the prohibition.

Harshman *v.* Bates Co., 92 U. S., 569.

II.

This Court also has jurisdiction to pass upon the question, whether there is evidence sufficient to establish agency on the part of Otis, as found by the State Court in deciding against his title.

In Lyttle *v.* Arkansas, Justice Catron, delivering the opinion of the Court, said: "It (the State Court) rejected the title of Cloyes; and in our opinion it is not material whether the invalidity of the title was decreed in the Supreme Court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that Court authorizes this Court to re-examine the decree. 14 Petrs., 360."

See 22 How., 203.

It is considered unnecessary to point out on the argument of this motion the errors of the State Court in finding agency. It is enough here to say that I have not been able to find anywhere in the record evidence to sustain such an inference; but, on the contrary, find Otis' positive testimony *against* it, given before the last Referee.

This is a case of novel impression. It is one in which the Mail Contract Statute should not be passed upon hastily. It is one in which the contractor, who made the affidavit, ~~required~~ required that *he* was the bidder and *in good faith*, is virtually declared to have committed perjury, and divested of his title, and that, too, when his own testimony sustained the face of the paper. See Philips *v.* Meily, Sup. Ct., Pa. (Leg. Int., Jan'y 9, '85). It is one in which the mere carrier, who was not liable to the government in any way, nor bound to the contractor to continue to carry the mails—who, in

short, could have ceased at any time to carry them, and left the contractor with all the responsibility—is declared, without any positive testimony and in the face of the Federal Statute, to be the real owner. It is a case of serious moment to the plaintiff in error. And I think the construction of the Statute is of great interest to the public.

The question of jurisdiction is so blended with the merits of the case, it has been found impossible to discuss one without touching the other. While it is doubtless desirable on the part of the defendant in error to have an early decision of the case, it should not be had until it can be fully argued.

Millinger *v.* Hortuper, 6 Wall, 262.

It should not be precipitated by a motion like this.

As the return to the writ of error has not been printed, I have been unable to refer to the pages thereof in this discussion. I submit that the motion should be dismissed.

Bank *v.* Ins. Co., 100 U. S., 43.
Ins. Co. *v.* Hoagland, 108 *ib.*, 5.
Meyer *v.* Walsh, 108 *ib.*, 17.

Reply to Brief of Defendant in Error.

I.

The first point is sufficiently answered by saying that the Federal questions appear in the decision of the Court of Appeals.

See Beer Co. *v.* Massachusetts, 97 U. S., 25.

But it also appears that both the Referee and the General Term passed upon the questions (Appeal

Book, fols. 253–5). Otis filed exceptions to the Referee's findings of fact and conclusion of law (*Ib.*, fols. 301–2). He also served notice of appeal from the decision of the General Term, which notice is not required to contain the grounds of appeal (see Code of Civ. Proc., §1300; 3 How., 369; 17 How., 381).

It can avail the defendant in error nothing to say that the Federal Statute should have been pleaded in the answer. If the contract had shown on its face The Oregon Steamship Co. as principal, and if Otis then wished to oppose a foreign Statute to it, it might be urged, with some plausibility, that the statute should be pleaded. That was the case in the authorities quoted by counsel But not so here. On the contrary, the complaint here is just as it would be if the contract showed on its face the company as principal. Otis denied making such a contract (see Answer, paragraph *fourth*). No such contract was proved; but the contract showing *him* to be principal was put in evidence, and letters and telegrams were offered to establish an owner different from the one named on the face of the contract. He was not required to anticipate this evidence by answer. Rather had he a right to contend that the proof did not correspond with the allegation, and showed just the contrary of agency and conversion. He certainly had a right to meet it with his own evidence, and the contention, that were it true, it would contravene the laws under which the contract was made and held.

Moreover, it was unnecessary to plead a statute under which both parties claimed—and especially a public statute. Indeed the case could not be heard without the Court becoming apprised of the fact that the position taken by the company contravened the law referred to by the contract as its basis. It was the duty of the Court even to raise the point of illegality.

Lee *v.* Johnston, 116 U. S.

In Murray *v.* Charleston, 96 U. S., 432, 441, Mr. Justice Strong said: "The form and mode in

which the Federal question was raised in the State Court is of minor importance, if, in fact, it was raised and decided."

The opinion of the Court of Appeals is made a part of the Record by subdivision 2 of Rule 8, of this Court. Moreover, it was expressly decided in Murdock *v.* City of Memphis, 20 Wall. 591, that, in determining whether a Federal question has been decided in the State Court, this Court may, under the Statute of 1867, look to the properly certified opinion of the State Courts when any has been delivered in the case. Besides this Court may look at the proceedings before the Referee, and the lower State Court in connection with the proceedings of the highest, in order to deduce therefrom the points decided by the latter.

Neilson *v.* Lagow, 12 How. 98.
See also Armstrong *v.* Treasurer, 16 Peters, 281.

Otis was not bound to appeal from the decision of the General Term granting a new trial to the defendant in error. It is doubtful whether he could have appealed under the sections of the Code of Civil Procedure quoted by counsel. But assuredly there is nothing in them *requiring* him to appeal upon pain of forfeiting his right to raise the question anew. The new trial granted was to be *de novo*. The second Referee so considered it, or he would not have passed on the Federal question himself. And the decision made by the first General Term was not an interlocutory judgment, or an intermediate order. Hence, the question went up regularly from the Referee through the second General Term to the Court of Appeals, and that Court gives no sanction to the point made

II.

The second point made by the defendant in error, viz.: "The question is not a Federal question, even if it appeared in the Record," has already been answered. The government executed the contract to Otis; his right and title is claimed and held under the United States and its Statute, commission and authority; the State Court has decided *against* it by declaring that another is the owner; and he submits that he cannot be divested of his ownership by a State Court, and the controversy stop there. He is at least entitled to have the Federal Court review the decision of the State Court. That makes it a Federal question, within the purview of § 709.

III.

The third point of the defendant in error is: "An erroneous construction of the U. S. Statute by the Court of Appeals would not, in this case, raise a Federal question." The principle quoted from 6 Wall., 142, does not apply to this case; for the reason that the State Court has not rested its judgment on some point in the case, not within the purview of § 709. It, on the contrary, rests its decision directly on its conclusion that Otis was only agent and the company owner. Nor does the case at 16 Petr., 525, apply; for the Return amply shows that the Federal questions were raised and decided.

The decisions of the Court of Appeals, which this Court is asked to review, proceeds to its conclusion that Otis is liable, by first determining that there is some testimony to show that he was *agent*

and the company owner of the contract; and then it proceeds to declare that such secret ownership is not in contravention of the U. S. Statutes. These are both Federal questions, as I have attempted to show. If these questions are dropped out of the decision, there is no other question upon which the decision can rest. For the questions decided touching the telegrams and letters are merely questions raised in the introduction of the testimony from which the agency of Otis and the ownership of the company were inferred.

The Court of Appeals did not decide that though the agency were illegal, such illegality could not operate as a defense when the contract has been executed and the proceeds received by the defendant. Hence, that point has no place in this discussion. But, in this case, the point could not have been sustained, had it been considered. The general rule is: "That no claim or defense can be maintained that requires the aid of an illegal agreement of the party in support of his case."

Leake on Cont., 771.
Thompson *v.* Thompson, 7 Ves., 470.

And it makes no difference that all the illegal parts have been performed. *Id.*

Hope *v.* Hope, 22 Beav., 351.

The cases of McBlair *v.* Gibbs and Brooks *v.* Martin, therefore, have no application. There, the illegality of the transactions, from which the proceeds originally sprung, appeared incidentally. But, in this case, the defendant in error could only show any claim by showing an illegal contract. The test, whether a demand connected with an illegal transaction can be enforced at law, is,

whether the plaintiff requires the aid of the illegal transaction to establish his case.

Armstrong *v.* Taber, 11 Wheat, 258.
Ogden *v.* Barker, 18 Johns, 87.
Seidenburden *v.* Charles, 4 S. and R., 150.
Swan *v.* Scott, 11 S. and R., 155.
Hipple *v.* Rice, 28 Penn. St., 406.
Simpson *v.* Bloss, 7 Taunt., 246.

This case will not bear that test. Hence, if there were any truth in the claim of agency and conversion, the Courts would not be permitted to enforce the demand, because of the fraud perpetrated upon the law.

The dispute between the two parties began about three years and a half before the contract terminated, and during all that time Otis paid the company as *his* agent and carrier. The company had no better legal claim when it sued than when the dispute first occurred. If Villard's testimony is true, it had no idea of suing for conversion during all that time, until the dispute occurred between him and Otis about the tardiness of Otis in paying the company the last quarter, as he had paid before (see Villard's testimony, Appeal Book, fos. 215-16).

The point that there was a special agreement outside of the agency, is not to be considered as a basis of the decision of the Court of Appeals; for it is not mentioned in the opinion. It could only be a proper point in an action *ex-contractu*. It is directly opposed to the conclusion of the Court of Appeals that Otis was agent and the company the owner. Otis was not sued in an action on special contract for accounting or for wages. He was proceeded against by action in *tort*. The complaint alleging agency and conversion shows that. And if there could have been any doubt about the nature of the action at first, there could not have been any

after the company characterized it by arresting Otis and holding him to bail therein.

Walter *v.* Bennett, 16 N. Y., 250.
DeGraw *v.* Elmore, 50 N. Y., 1

In order to sustain the action in tort, therefore, it was necessary to find agency, conversion and legality of secret ownership of a mail contract; for the contract on its face was the property of Otis. For that reason it was necessary for the Court of Appeals to pass on the two Federal questions I have before discussed, and the authorities quoted by counsel become authorities for our position, and do not sustain that of the defendant in error.

If, indeed, the case had been decided on a State question as well as on Federal questions, the writ of error will not be discussed on motion in advance of the hearing. "The parties are entitled to be heard on the soundness of the decision below on the Federal question, on the sufficiency of that question to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the Federal question was erroneously decided."

Railroad Co. *v.* Maryland, 20 Wall, 643.

In such cases, even if the Federal question is not the principal ground upon which the State court placed its judgment, this Court would have jurisdiction.

Railroad Co. *vs.* Maryland, 21 Wall, 467.

IV.

There can be no doubt that a final judgment which this Court can review, has been made. In